SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 225

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

OTTO H. FALK ET AL., EXECUTORS OF THE ESTATE OF CHARLES F. PFISTER, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1 Charles F. Pfister, Amended Title, Otto H. Falk, Jos. E. Uihlein, Chas. P. Vogel & Louis Quarles, Exec. of the Est. of Chas. F. Pfister, deceased. See order of October 3, 1931. *Petitioner,*

vs.

Commissioner of Internal Revenue, *Respondent.* } Docket No. 28070.

Appearances:

For Taxpayer: Chas. F. Fawsett, Esq., R. S. Doyle, Esq.

For Comm'r.: P. A. Bayer, Esq.

DOCKET ENTRIES.

1927

May 5—Petition received and filed. Taxpayer notified.

May 6—Copy of petition served on General Counsel.

Jul. 5—Motion for extension of time to Nov. 2, 1927 to answer, filed by General Counsel.

Jul. 6—Granted. Both sides notified.

Oct. 25—Answer filed by General Counsel.

Oct. 27—Copy of answer served on taxpayer. General Calendar.

1929

Aug. 13—Hearing set Nov. 25, 1929.

Aug. 30—Notice of the appearance of R. S. Doyle, attorney for taxpayer.

Aug. 30—Motion to place on Reserve Calendar, filed by taxpayer. Sep. 4, 1929 granted.

1930

Jan. 4—Hearing set Feb. 26, 1930.

Feb. 19—Motion for continuance to April 28, 1930 filed by taxpayer. (34678)

Feb. 20—Motion granted and set for hearing on April 28, 1930.

Apr. 23—Motion for continuance to May 21, 1930 filed by taxpayer. April 25, 1930 granted to May 21, 1930.

Apr. 28—Motion to place on Field Calendar filed by taxpayer. April 30, 1930 granted.

May 21—Hearing set July 8, 1930, Milwaukee, Wisc.

Jul. 8—Hearing had before Stephen J. McMahon, Div. 16 on merits. Stipulation of facts received. Consolidated with Dkts. 34678, 35815, 34758, 34759, 40426 & 41089. Briefs due Oct. 1, 1930.

Jul. 25—Transcript of hearing of July 8, 1930, filed.

Sep. 10—Motion for extension to Nov. 1, 1930 to file brief, filed by taxpayer. Sept. 11, 1930 granted.

Oct. 1—Brief filed by General Counsel.

Oct. 21—Motion for extension to Dec. 1, 1930 to file brief, filed by taxpayer. Oct. 22, 1930 granted.

Nov. 14—Brief filed by taxpayer.

1931

Oct. 3—Order amending title to read Otto H. Falk, Jos. E. Uihlein, Chas. P. Vogel and Louis Quarles, Exe. of the Est. of Chas. F. Pfister, deceased, entered.

Oct. 7—Findings of fact and opinion rendered. Stephen J. McMahon, Div. 16. Judgment will be entered for the respondent.

Oct. 9—Decision enterel. Stephen J. McMahon Div. 16.

2 1932.

Feb. 24—Stipulation consolidating dockets 34678, 34758, 34759, 35815, 40426 and 41089 for the petition for review, filed.

Feb. 24—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.

Feb. 24—Proof of service filed.

Feb. 24—Praecipe with proof of service thereon filed.

27. 9 * * * (Caption 28070) * *

PETITION,

Filed May 5, 1927.

The above named petitioner hereby petitions for redetermination of the proposed deficiency in tax of $848.30 against him for the year 1922 set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols IT:PA: 4-60D FAL) dated March 7, 1927, and as the basis of his proceeding alleges as follows:

I.

Your petitioner is a citizen of the state of Wisconsin with his residence at the city of Milwaukee and his post office address, 425 East Water Street in said city of Milwaukee, state of Wisconsin.

10

II.

The notice of deficiency (a copy of which is attached and marked Exhibit "A") referred to above was mailed to the petitioner on the 7th day of March, 1927.

III.

The taxes in controversy are income and profits taxes claimed to be due from petitioner for the calendar year 1922 and the amount of such taxes in dispute is the entire amount claimed as the deficiency in said notice, to-wit, the sum of $848.30.

IV.

The determination of tax set forth in said notice is based upon the following error, namely:

The commissioner erred in disallowing the deduction of $15,954.91 claimed in the return filed by Pfister, Smith & Mariner, Trustees, for the year 1922 as depletion of the iron ore mine which was the subject of the trust and of which trust the petitioner was one of the beneficiaries with the result that his share of the taxable income from said trust was increased to the extent which resulted in said deficiency in tax.

11

V.

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

In the year 1922 and prior thereto, a certain iron ore mine located in the state of Michigan known as the Bristol mine was held in trust by your petitioner and two other trustees under which petitioner as one of the beneficiaries was entitled to one-eighth of the net income of said trust. Said mine so held in trust during said year 1922 and for a number of years prior thereto was subject to a lease, the term of which extended for a number of years beyond the year 1922. The sole income derived by the trustees from said mine as the owners of the fee thereof or which they could derive therefrom under the terms of said lease was the royalties payable under said lease by the lessee thereof.

In or about the month of February, 1925, the basis of valuation of said mine for purposes of depletion was revised and redetermined by mineral section and other representatives of the Income Tax Unit of the Treasury Department, as the result of which the basis of such valuation for the purpose of depletion was determined as follows:

12

Ore reserve 3/1/13			3,556,732 Tons
Mined 3/1/13 to 11/29/16			
1913		379,170	
1914		172,006	
1915		378,830	
1916		462,800	1,392,806
Ore reserve 11/29/16			2,163,926
Royalty rate—19 cents			
Gross expected royalty			$411,146.94
Less 3% expected expense			12,334.37
Net expected profit			398,811.57
Factor—6%—4%—9 years— .719198			
None removed from Nov. 29, 1916 to Jan. 1, 1917			
Value of royalties as at Jan. 1, 1917			286,824.48
Less — 1917	188,689 Tons	$25,010.35	
1918	245,280	32,511.37	
1919	58,138	7,706.07	
1920	368,488	48,842.35	
1921	13,555	1,796.69	115,866.83
	874,150		
Residual value—1,289,770 tons at .13255			170,957.65

Thereafter, on March 17, 1925, the trustees received a letter from the Commissioner (Bureau Symbols IT:PA:3 EPR:301) giving the results of a reaudit of the trustees' returns for the years 1917 to 1921 inclusive based on the above basis of valuation and rates for depletion.

Thereafter, to-wit, on the 6th of April, 1925, the trustees filed an amended return for the year 1922 on the basis of said revised valuation and depletion rates determined as aforesaid claiming a deduction of $.13255 per ton for depletion in strict accordance with said determination by the department as above stated, and as petitioner is informed and believes said trust was in law and in fact entitled to such allowance for

13 depletion. Such amended return on the basis of said allowance for depletion showed your petitioner's share of the taxable income from said trust for the year 1922 to be $742.68 which as petitioner is informed and believes was in fact the true amount of his share of the net taxable income of said trust for the year 1922.

In the determination of the tax liability of petitioner for

the year 1922 as shown by said Exhibit "A" and the statement made a part thereof hereto annexed, the entire deduction claimed by said trustees for depletion for the year 1922 was disallowed, and as petitioner is informed and believes the deficiency in tax claimed in said notice results solely from such erroneous disallowance of said deduction for depletion.

Wherefore petitioner prays that this Board may hear this proceeding and redetermine the tax liability of petitioner for the said year 1922 on the basis of the facts and the claims of this petitioner as stated herein and that the Board grant to the petitioner such other and further relief in the premises to which we may be entitled.

CHARLES F. FAWSETT
Counsel for Petitioner.

P. O. Address: Room 928—425 East Water St.
Milwaukee, Wisconsin.

14 State of Wisconsin, }
Milwaukee County. } ss.

CHARLES F. PFISTER being duly sworn says that he is the petitioner making the foregoing petition; that he has read said petition and is familiar with the statements contained therein and that the facts therein stated are true except as to those stated to be on information and belief and those facts he believes to be true.

CHARLES F. PFISTER

Subscribed and sworn to before me this 2nd day of May, A. D. 1927.

(Notarial Seal)

OSCAR E. NELL
Notary Public, Milwaukee County, Wisconsin.

15

TREASURY DEPARTMENT
Washington

IT:PA:4-60D. Mar. 7, 1927.
FAL
Mr. Charles F. Ffister,
1210 First Wisconsin National Bank Building,
Milwaukee, Wisconsin.

Sir:

A reaudit of your return for the year 1922 discloses a deficiency in tax of $848.30. The adjustments made are shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not doe so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C. for the attention of IT:PA:4-60D,FAL. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. R. NASH
Assistant to the Commissioner.

Inclosures:
Statement
Form A
Form 882

16

Mar. 7, 1927.

Statement.

IT:PA:4-60D
FAL

In re: Mr. Charles F. Pfister,
1210 First Wisconsin National Bank Bldg.,
Milwaukee, Wisconsin.

Year	Deficiency in Tax
1922	$848.30

Reference is made to the report of the examining officer, dated May 14, 1925, covering an investigation of your books of account and records for the year 1922. An examination of the report discloses income of $742.68 from Pfister, Smith and Mariner, trustees, and a total net income of $89,073.49.

You are advised that information now on file in this office discloses that your distributive share of the income from the trustees is $2,737.02 instead of the amount shown in the report.

The increase results from the disallowance of the deduction of $15,954.91 claimed on the return filed by the trustees for depletion, since information on file in this office does not disclose that the trust meets the provisions of Treasury Decision 2267—ARR 3959 and I. T. 2218. The adjusted income of the trust is $21,896.17 ($5,941.26, shown in the report, plus $15,954.91, depletion disallowed) and your distributive share is $2,737.02 instead of $742.68 shown in the report. As a result of this adjustment your net income is $91,067.83.

The tax has been computed as follows:

Net Income		$91,067.83
Less:		
Personal exemption	$1,000.00	
Dividends	97,513.73	98,513.73
Income subject to normal tax		None
Surtax on $91,067.83		18,419.17
Credit tax paid at source		18.40
Balance		18,400.77
17 Tax previously assessed	16,399.34	
Plus additional tax	1,153.13	17,552.47
Deficiency in Tax		848.30

Payment of the deficiency in tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

18. *In re:* Mr. Charles F. Pfister,
Milwaukee, Wisconsin.

Form A

Waiver of Right to File a Petition With the U. S. Board of Tax Appeals.

The undersigned taxpayer hereby waives the right to file a petition with the U. S. Board of Tax Appeals under Section

274 (a) of the Revenue Act of 1926 and consents to the assessment and collection of a deficiency in tax for the year 1922 aggregating $848.30.

Mar. 7, 1927.

.....
(Name)

.....
(Address)

Date .....

By .....

Note: This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 1106 of the Revenue Act of 1926.

1927. 19 • • (Caption 28070) • •

ANSWER.

Filed Oct. 25, 1927.

Now comes the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for answer to the petition of this taxpayer, admits and denies as follows:

I.

Admits the allegations of fact contained in paragraph I of the petition.

II.

Admits the allegations of fact contained in paragraph II of the petition.

III.

Admits the allegations of fact contained in paragraph III of the petition.

IV.

Admits that the Commissioner disallowed a deduction of $15,954.91, claimed on a return filed by Pfister, Smith & Mariner, Trustees, for the year 1922, as depeltion of an iron ore mine, but denies that he erred in so doing, and further denies that he erred in the determination of said deficiency in any manner whatsoever.

V.

Admits that the petitioner is a beneficiary under a certain trust and is entitled to one-eighth of the net income of said trust for the year 1922.

Denies generally and specifically each and every allegation of error or of fact contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOSEPH B. HARLACHER,
Special Attorney,
Bureau of Internal Revenue.

3 Otto H. Falk, Joseph E. Uihlein, Charles P. Vogel & Louis Quarles, Executors of Last Will & Testament of Charles F. Pfister,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 34678.

Appearances:

For Taxpayer: C. F. Fawsett, Esq., R. S. Doyle, Esq.

For Comm'r.: P. A. Bayer, Esq.

DOCKET ENTRIES.

1928

Feb. 6—Petition received and filed. Taxpayer notified. (Fee paid)

Feb. 7—Copy of petition served on General Counsel.

Mar. 6—Answer filed by General Counsel.

Mar. 10—Copy of answer served on taxpayer. General Calendar.

1929

Aug. 30—Notice of the appearance of R. S. Doyle, attorney for taxpayer. See 28070.

Nov. 18—Hearing set Jan. 28, 1930.

Dec. 10—Motion to place on the Reserve Calendar, filed by taxpayer. December 11, 1929 granted.

1930

Jan. 4—Hearing set Feb. 26, 1930.

Feb. 19—Motion to continue to April 29, 1930 filed by taxpayer. Feb. 20, 1930 granted and set for hearing April 28, 1930.

Apr. 23—Motion to continue to May 21, 1930 filed by taxpayer. See 28070. Apr. 25, 1930 granted to May 21, 1930.

Apr. 28—Motion to place on Field Calendar filed by taxpayer. April 30, 1930 granted.

May 21—Hearing set July 8, 1930 at Milwaukee, Wisc.

Jul. 8—Hearing had before Stephen J. McMahon, Div. 16 on merits. Consolidated with 35815, 34758, 37459, 40426, 41089. Stipulation of facts received. Briefs due Oct. 1, 1930.

Jul. 25—Transcript of hearing of July 8, 1930 filed.

Sep. 10—Motion for extension to Nov. 1, 1930 to file brief, filed by taxpayer. September 11, 1930 granted.

Oct. 1—Brief filed by General Counsel.

Oct. 21—Motion for extension to Dec. 1, 1930 to file brief, filed by taxpayer. October 22, 1930 granted.

Nov. 14—Brief filed by taxpayer.

1931

Oct. 7—Findings of fact and opinion rendered, S. J. McMahon, Div. 16. Judgment will be entered for respondent.

Oct. 9—Decision entered, Stephen J. McMahon, Div. 16.

1932

Feb. 24—Stipulation consolidating dockets 28070, 34678, 34758, 34759, 35815, 40426 and 41089 for petition for review filed.

Feb. 24—Petition for review to U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.

Feb. 24—Proof of service filed.

Feb. 24—Praecipe filed, proof of service thereon.

21 * * (Caption 34678) * *

PETITION.

Filed Feb. 6, 1928.

The above named petitioners hereby petition for redetermination of the proposed deficiency in tax of $2,065.93 against Charles F. Pfister for the year 1923 set forth by the Commissioner of Internal Revenue in his notice or deficiency (IT:

FAR:B-2 MLR-60D) dated December 10, 1927, and as a basis of their proceeding alleges as follows:

I. The above named Charles F. Pfister died at the city of Milwaukee on the 12th day of November, 1927, being at the time of his death a resident and citizen of the city of
22 Milwaukee, state of Wisconsin, and leaving a last will and testament. Thereafter said will was admitted to probate and was duly probated in and by the county court of Milwaukee County, Wisconsin, and petitioners named therein as executors were duly appointed and qualified as such and ever since have been the duly appointed, qualified and acting executors of the said last will and testament of the said Charles F. Pfister.

II. The notice of deficiency, a copy of which is attached and marked Exhibit "A" referred to above is dated December 10, 1927, and was on that date mailed to the said Charles F. Pfister.

III. The taxes in controversy are income and profits taxes claimed to be due from the said Charles F. Pfister for the calendar year 1923 and the amount of such taxes in dispute is the entire amount claimed as a deficiency in said notice, to-wit, the sum of $2065.93.

IV. The determination of tax set forth in said notice is based upon the following errors, namely:

(1) The Commissioner erred in disallowing the deduction of $60,279.76 claimed in the return filed by Pfister, Smith
23 and Mariner, for the year 1923, as depletion of an iron ore mine which was the subject of the trust referred to in said return and of which trust the said Charles F. Pfister was one of the beneficiaries with the result that $7,534.97 was erroneously added to the taxable income of the said Charles F. Pfister for the year 1923 as shown by Exhibit "A" hereto annexed. A copy of the notice of the Commissioner to the said Pfister, Smith & Mariner, Trustees, dated December 10, 1927, disallowing said claimed deduction of $60,279.76 which resulted in said deficiency shown in said Exhibit "A" hereto annexed, is attached hereto marked Exhibit "B" and made part hereof.

(2) The Commissioner erred in determining that there is any deficiency tax due from said Charles F. Pfister for the year 1923.

V. The facts upon which petitioners rely as the basis of this proceeding are as follows:

(a) In the year 1923 and prior thereto a certain iron ore

mine located in the state of Michigan known as the Bristol Mine was held in trust by the said Charles F. Pfister and two other trustees under which the said Charles F. Pfister
24 was one of the beneficiaries.

(b) The provisions of the trust conveyance by which said trust was created in so far as material to this proceeding were in substance as follows:

Said instrument was made, executed and delivered November 29, 1916, by which certain real estate in Michigan including said mine was conveyed to the trustees of which the said Charles F. Pfister was one, in trust, with full powers of sale, management and control and providing that after the payment of costs of administration and prior charges,

"All proceeds which shall come to the hands of the trustees from said property or from any use which may be made thereof, or from any source whatsoever hereunder as received by the trustees shall belong to and be the property of the beneficaries hereunder, to be distributed and paid over to them in proportion to and in accordance with their respective interests as shown herein or as the same shall from time to time appear as hereinafter provided.

The beneficiaries of the trust hereby created and hereinbefore referred to and their respective interests hereunder at the time of the execution and delivery of this instrument are as follows:

Jesse Hoyt Smith—	1/4
Lucinda W. Mariner—	1/8
John W. Mariner	1/8
Charles F. Pfister	1/8
Louise F. Vogel	1/8
Executors and trustees under the last will and testament of Jesse Hoyt, deceased—	1/4"

25 (c) At the time of the execution of said trust conveyance, to-wit, November 29th, 1916, said Bristol Mine was subject to a mining lease for term of upwards of 15 years, exceeding the life of said mine on the basis of estimated ore reserves and the established rules for determining the life of said mine, so that during the term of said lease it could be assumed that all of the ore in said mine would be taken out and disposed of under said lease.

(d) The sole income and entire proceeds derived from the trust estate since the execution of said trust conveyance has been the royalties payable by the lessees under said lease to the owners of the fee, who after said trust conveyance were

the trustees under said conveyance. The royalty rate reserved in said lease was 19 cents per ton.

(e) In or about the month of February, 1925, in connection with the audit of the accounts of the trustees for the years 1917, 1918, 1919, 1920 and 1921 the basis of valuation of said Bristol Mine for purposes of depletion was revised and redetermined by the mineral section and other representatives of the Income Tax Unit of the Internal Rev-
26 enue Department in conference with duly authorized representatives of said trustees with the result that the basis of valuation of said mine for purposes of depletion was determined by the department as follows:

Ore reserve 3/1/13			3,556,732 Tons
Mined 3/1/13 to 11/29/16			
1913	379,170		
1914	172,006		
1915	378,830		
1916	462,800		
			1,392,806
Ore reserve 11/29/16			2,163,926
Royalty rate—19 cents			
Gross expected royalty			$411,146.94
Less 3% expected expense			12,334.37
Net expected profit			398,811.57
Factor—6%—4%—9 years—.719198			
None removed from Nov. 29, 1916 to Jan. 1, 1917			
Value royalties as at Jan. 1, 1917			286,824.48
Less—1917	188,689 Tons	$25,010.35	
1918	245,280	32,511.37	
1919	58,138	7,706.07	
1920	368,488	48,842.35	
1921	13,555	1,796.69	115,866.83
	874,150		
Residual value—1,289,776 tons at .13255			170,957.65

(f) Said basis of valuation as so determined by the Income Tax Unit was proposed to the representatives of said trustees for acceptance in settlement of the controversy in relation to the matter then pending before said Income Tax Unit and was accepted and expressly agreed to on behalf of said trustees with the understanding that such settlement and

determination was subject to the approval of the Commissioner.

27 (g) Thereafter on March 17, 1925, the trustees received a letter from the Commissioner (IT:PA:3 EPR: 301) confirming said determination and basis of valuation for purposes of depletion and advising the trustees of the results of the audit by the Department of their books and accounts for income tax purposes for the years 1917 to 1921 inclusive based on said determination and upon the rates for depletion shown therein.

(h) After the receipt of said letter of March 17, 1925, confirming said settlement and determination of the basis of valuation of said mine for purposes of depletion, the trustees filed returns for the years 1922, 1923 and 1924 on the basis of said determination claiming a deduction of .13255 cents per ton for depletion in accordance therewith and the depletion claimed by them in their said amended return for the year 1923 in accordance with said determination and to which as they are informed and believe, they were lawfully entitled was the sum of $60,279.76.

(i) The facts upon which said rate of depletion was based shown in the statement and computation above referred to, as petitioners are informed and believed, were substantially correct and entitled said trustees to the rate of depletion therein stated, to-wit, .13255 cents per ton.

28 (j) The ore taken from said mine under said lease for the year 1923 was 454,770 tons which at the rate of depletion established as aforesaid entitled the said trustees to a deduction of $60,279.76.

(k) Since the execution of said trust conveyance it has been the practice of the trustees thereunder as authorized and required by the terms thereof to make distribution of the entire royalties received by them under said lease from time to time among the beneficiaries of said trust in accordance with their respective interests as before stated after paying or reserving costs of administration and prior charges without reserving from such distribution the portion of such royalties corresponding to the proper allowance for depletion.

(l) In the year 1925 the income and profits tax return of the said Charles F. Pfister for the year 1923 was duly audited by the Department of Internal Revenue and in determining the taxable income of the said Charles F. Pfister for that year derived by him from said trust, the deduction of $60,-

29 279.76 taken by said trustees for depletion as aforesaid was accepted and confirmed, and based thereon an addi-

tional tax for said year 1923 was assessed against the said Charles F. Pfister in the sum of $17,123.00 which was paid by the said Charles F. Pfister on or about the 15th of December, 1925.

(m) Notwithstanding the foregoing, in the year 1927 the Commissioner undertook to reopen the audit of said return of the said Charles F. Pfister for the year 1923 and upon such reaudit erroneously disallowed the entire deduction claimed by said trustees for depletion for said year 1923 with the result that $7,534.97 was added to the taxable income of the said Charles F. Pfister for the year 1923 resulting in said deficiency in tax of $2,065.93 referred to in said notice of deficiency.

(n) Petitioners allege upon information and belief that said sum of $7,534.97 added to the taxable income of said Charles F. Pfister for the year 1923 as aforesaid was not in law or in fact income but represented to that extent a return to the said Charles F. Pfister by the trustees under said trust conveyance of his share of the corpus of the trust estate held by said trustees and that such addition to the taxable income was erroneous.

30 (o) Petitioners further allege upon information and belief that by reason of the facts hereinbefore stated the determination of the valuation of said mine for purposes of depletion and the depletion rate as aforesaid and the audit of the return of the said Charles F. Pfister for 1923 made in the year 1925 and the payment of the additional assessment based on said audit as aforesaid should be held to be binding and conclusive upon the Commissioner, and that the reopening of said audit in the year 1927 was erroneous and without justification.

Wherefore petitioners pray that this Board hear this proceeding; that the deduction for depletion taken by said trustees for the year 1923 be affirmed and allowed and that the tax liability of the said Charles F. Pfister and of the petitioners for said year 1923 be redetermined accordingly, and that it be determined that the petitioners or the estate of the said Charles F. Pfister are not liable for any deficiency in tax for said year 1923.

CHARLES F. FAWCETT
Counsel for Petitioners.
P. O. Address: 425 West Water Street
Milwaukee, Wisconsin.

31 State of Wisconsin, }
Milwaukee County. }

OTTO H. FALK being first duly sworn deposes and says that he is one of the executors of the last will and testament of Charles F. Pfister, deceased, and one of the petitioners making the foregoing petition; that he makes this verification for himself and on behalf of his co-executors and petitioners, and is duly authorized so to do; that he has read said petition and is familiar with the contents thereof and that all the statements of fact therein contained are true to the knowledge of this affiant except as to matters therein stated on information and belief and as to those matters he believes them to be true.

OTTO H. FALK

Subscribed and sworn to before me this 3 day of February, 1928.

OSCAR E. NELL
(Seal) *Notary Public, Milwaukee County, Wisconsin.*

32 EXHIBIT "A"

TREASURY DEPARTMENT
Washington

IT:FAR:B-2 Dec. 10, 1927.
MLR-60D
Mr. Chas. F. Pfister,
1210 First National Bank Building,
Milwaukee, Wisconsin.

Sir:

The determination of your tax liability for the year 1923 discloses a deficiency of $2,065.93, as shown by the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C. and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a

petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C. for the attention of IT:FAR:B-2, MLR-60D.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,
D. H. BLAIR,
By C. B. ALLEN,
Deputy Commissioner.

Enclosures:
Statement
Form A
Form 882

33

Statement.

Dec. 10, 1927.

IT:FAR:B-2
MLR-60D

In re: Mr. Chas. F. Pfister,
1210 First National Bank Building,
Milwaukee, Wisconsin.

Year	Deficiency in Tax
1923	$2065.93

Your taxable net income as previously adjusted by an Internal Revenue Agent has been further increased as follows:

Total net income per Revenue Agent's Report dated May 14, 1925		$167,767.43
Capital net gain taxable at 12½%		93,391.82
Ordinary net income per Revenue Agent's Report		$ 74,375.61
Add:		
Increase in distributive income, Pfister, Smith and Mariner		7,534.97
Ordinary net income as adjusted		81,910.58
Less:		
Personal exemption	$ 1,000.00	
Dividends	99,807.52	100,807.52
Balance for normal tax		none
Surtax on $81,910.58		14,686.02
Tox on capital net gain 12½% of $93,391.82		11,673.97
Total		26,359.99
Less: 25% reduction Revenue Act 1924	6,589.99	
Tax paid at source	20.03	6,610.02
Net tax assessable		19,749.97
Previously assessed:		
Original	21,295.65	
25% reduction Revenue Act 1924	5,323.91	
	15,971.74	
Additional deficiency to be assessed	1,712.30	17,684.04
		2,065.93

34 The increase in distributive income from Pfister, Smith and Mariner is in accordance with the adjustment of the trust's return for 1923 and results from the disallowance of the deduction claimed for depletion which has been fully explained in a letter addressed to the Trustees.

Payment of the deficiency in tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

35

EXHIBIT "B."

TREASURY DEPARTMENT
Washington

IT:FAR:B-2 Dec. 10, 1927.
MLR

Pfister, Smith and Mariner, Trustees,
133 Mason Street,
Milwaukee, Wisconsin.

Sirs:

A review of your 1923 return of income, Form 1041, has been completed in connection with an examination of your books of account and records.

The report of the Internal Revenue Agent in Charge at Milwaukee, Wisconsin, dated November 28, 1925, has been reviewed and approved for 1923 with the following exception:

It is found that depletion is not deductible from the distributive income of the trust since the terms of the trust agreement do not appear to meet the requirements outlined in Treasury Decision 2267, ARR 3959 (Cumulative Bulletin II-2, Page 162) and IT:2218 (Cumulative Bulletin III-2, Page 61).

The amount of $60,279.76 deducted for depletion is therefore added to the net income reported in the amended Form 1041, resulting in a revised distributive income of $128,536.66 which will be apportioned among the beneficiaries as follows:

Chas. F. Pfister	$16,067.08
Elmwood Company of Delaware	16,067.08
Ida Lane Smith	32,134.16
J. W. Mariner	32,134.16
A. M. Hoyt and Company	25,707.34
Alice C. Dane	6,426.84

The beneficiaries will be duly notified of the adjustment in their individual income.

Respectfully,
C. B. ALLEN
Deputy Commissioner
By PORTER LINDER,
Head of Division.

1928. 36 * * (Caption 34678) * *

ANSWER.

Filed Mar 6-1928.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, admits and denies as follows:

I. The Commissioner for the want of information and knowledge sufficient to form a belief as to the allegations contained in paragraph (I) of the petition neither admits nor denies, but calls for strict proof thereof.

II. Admits the allegations contained in paragraph (II) of the petition.

III. Admits the allegations contained in paragraph (III) of the petition.

IV. Denies the Commissioner erred in respect to the matters set forth in subdivisions (1) and (2) of paragraph (IV) of the petition.

V(a) Admits the allegations contained in subdivision (a) of paragraph (V) of the petition.

V(b) The Commissioner for the want of information and knowledge sufficient to form a belief as to the allegations contained in subdivision (b) of paragraph (V), denies the same.

37 V(c) Admits that at the time of the execution of said trust conveyance on November 29, 1916, said Bristol Mine was subject to a mining lease as alleged in subdivision (c) of paragraph (V), but denies the remainder of the allegations contained in said subdivision (c) of paragraph (V) of the petition.

V(d) Denies the allegations contained in subdivision (d) of paragraph (V) of the petition.

V(e) Denies the allegations contained in subdivision (e) of paragraph (V) of the petition.

V(f) Denies the allegations contained in subdivision (f) of paragraph (V) of the petition.

V(g) Denies the allegations contained in subdivision (g) of paragraph (V) of the petition.

V(h) Denies the allegations contained in subdivision (h) of paragraph (V) of the petition.

V(i) Denies the allegations contained in subdivision (i) of paragraph (V) of the petition.

V(j) Denies the allegations contained in subdivision (j) of paragraph (V) of the petition.

V(k) Denies the allegations contained in subdivision (k) of paragraph (V) of the petition.

V(l) Denies the allegations contained in subdivision (l) of paragraph (V) of the petition.

38 V(m) Admits that the Commissioner disallowed the entire deduction taken by the trustees for depletion in the year 1923, and thereby increased the petitioner's income by the sum of $7,534.97 for the said year 1923, which resulted in the said deficiency in tax of $2,065.93 for the year 1923, as alleged in subdivision (m) of paragraph (V), but denies the remainder of the allegations contained in said subdivision (m) of paragraph (V) of the petition. Further denies that such disallowance was erroneous.

V(n) Denies the allegations contained in subdivision (n) of paragraph (V) of the petition.

V(o) Denies the allegations contained in subdivision (o) of paragraph (V) of the petition.

Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:

SHELBY S. FAULKNER,
Special Attorney,
Bureau of Internal Revenue.

AMENDMENT TO ANSWER.

(Read into record July 8, 1932)

* * * The allegations contained in paragraph 1 of the petition are admitted.

4

Ida Lane Smith,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 34758.

DOCKET ENTRIES.

Appearances:

For Taxpayer: Chas. F. Fawsett, Esq., R. S. Doyle, Esq.

For Comm'r.: P. A. Bayer, Esq.

1928

Feb. 8—Petition received and filed. Taxpayer notified. (Fee paid)

Feb. 9—Copy of petition served on General Counsel.

Mar. 28—Answer filed by General Counsel.

Mar. 29—Copy of answer served on taxpayer. General Calendar.

1929

Aug. 30—Notice of the appearance of R. S. Doyle, attorney for taxpayer. See 28070.

1930

Jan. 4—Hearing set Feb. 26, 1930.

Feb. 19—Motion for continuance to April 28, 1930 filed by taxpayer. See 34678. Granted to Feb. 20, 1930.

Apr. 23—Motion for continuance to May 21, 1930 filed by taxpayer. See 28070. April 25, 1930 granted to May 21, 1930.

Apr. 28—Motion to place on field calendar filed by taxpayer. April 30, 1930 granted.

May 21—Hearing set July 8, 1930 at Milwaukee, Wisc.

Jul. 8—Hearing had before S. J. McMahon, Div. 16 on merits. Stipulation of facts received. Consolidated with 34678—35815—34759—40426 and 41089. Briefs due Oct. 1, 1930.

Jul. 25—Transcript of hearing of July 8, 1930, filed.

Sep. 10—Motion for extension to Nov. 1, 1930 to file brief, filed by taxpayer. September 11, 1930 granted.
Oct. 1—Brief filed by General Counsel. See 28075.
Oct. 21—Motion for extension to Dec. 1, 1930 to file brief, filed by taxpayer. October 22, 1930 granted.
Nov. 14—Brief filed by taxpayer.
1931
Oct. 7—Findings of fact and opinion rendered, Stephen J. McMahon, Div. 16. Judgment will be entered for respondent.
Oct. 9—Decision entered, S. J. McMahon, Div. 16.
1932
Feb. 24—Stipulation consolidating Dkts. 28070, 34678, 40426, 34759, 35815 & 41089 for petition for review filed.
Feb. 24—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.
Feb. 24—Proof of service filed.
Feb. 24—Praecipe filed with proof of service thereon.

39 * * (Caption 34758) * *

PETITION.

Filed Feb. 8, 1928.

The above named petitioner hereby petitions for redetermination of the proposed deficiency in tax of $7,590.58 against her for the year 1923 set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:FAR:B-2 MLR-60D) dated December 10, 1927, and as a basis for her proceeding alleges as follows:

I. The petitioner is a resident of the city of Milwaukee and a citizen of the state of Wisconsin residing at 411 Terrace Avenue, Milwaukee, Wisconsin, which is also her post office address.

40 II. The notice of deficiency a copy of which is attached and marked Exhibit "A" referred to above is dated December 10, 1927, and was on that date mailed to the petitioner.

III. The taxes in controversy are income and profits taxes claimed to be due from the petitioner for the calendar year 1923 and the amount of such taxes in dispute is the major part of the amount claimed as a deficiency in said notice, to-wit, the sum of $7,590.58, but petitioner is unable to state the precise amount of the tax in controversy based upon the assignment of errors hereinafter stated.

IV. The determination of tax set forth in said notice is based upon the following errors, namely:

(1) The Commissioner erred in disallowing the deduction of $60,279.76 claimed in the return filed by Pfister, Smith and Mariner, Trustees, for the year 1923 as depletion of an iron ore mine which was the subject of the trust referred to in said return and of which trust petitioner was one of the beneficiaries with the result that the sum of $15,069.94 was erroneously added to the taxable income of petitioner
41 for said year 1923 as shown in Exhibit "A" hereto annexed. A copy of the notice of the Commissioner to the said Pfister, Smith and Mariner, Trustees, dated December 10, 1927, disallowing said claimed deduction of $60,279.76 is hereto attached and marked Exhibit "B" and made part hereof.

(2) The Commissioner erred in disallowing depletion claimed for the Gwynn Mine as shown in said Exhibit "A" with the result that $1690.40 was erroneously added to the taxable income of the petitioner.

V. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) In the year 1923 and prior thereto a certain iron ore mine located in the state of Michigan known as the Bristol Mine was held in trust by three trustees which said trust was known as the Pfister, Smith and Mariner Trust.

(b) The provisions of the trust conveyance by which said trust was created in so far as material to this proceeding were in substance as follows:

Said instrument was made, executed and delivered November 29, 1916, by which certain real estate in Michigan
42 including said mine was conveyed to said three trustees in trust with full powers of sale, management and control and providing that after the payment of costs of administration and prior charges,

"All proceeds which shall come to the hands of the trustees from said property or from any use which may be made thereof, or from any source whatsoever hereunder as received by the trustees shall belong to and be the property of the beneficiaries hereunder, to be distributed and paid over to them in proportion to and in accordance with their respective interests as shown herein or as the same shall from time to time appear as hereinafter provided.

The beneficiaries of the trust hereby created and hereinbefore referred to and their respective interests hereunder at

the time of the execution and delivery of this instrument are as follows:

Jesse Hoyt Smith—	1/4
Lucinda W. Mariner—	1/8
John W. Mariner	1/8
Charles F. Pfister	1/8
Louise F. Vogel	1/8
Executors and trustees under the last will and testament of Jesse Hoyt, deceased—	1/4."

On the 4th day of January, 1921, Jesse Hoyt Smith, the owner of a 1/4 beneficial interest under said trust deed as above shown died and this petitioner as the chief beneficiary under his will succeeded to said 1/4th interest, since which time her beneficial interest under said trust and in the net proceeds resulting therefrom has been 1/4th.

43 (c) At the time of the execution of said trust conveyance, to-wit, November 29th, 1916, said Bristol Mine was subject to a mining lease for a term of upwards of 15 years, exceeding the life of said mine on the basis of estimated ore reserves and the established rules for determining the life of said mine, so that during the term of said lease it could be assumed that all of the ore in said mine would be taken out and disposed of under said lease.

(d) The sole income and entire proceeds derived from the trust estate since the execution of said trust conveyance has been the royalties payable by the lessees under said lease to the owners of the fee, who after said trust conveyance were the trustees under said conveyances. The royalty rate reserved in said lease was 19 cents per ton.

(e) In or about the month of February, 1925, in connection with the audit of the accounts of the trustees for the years 1917, 1918, 1919, 1920 and 1921 the basis of valuation of said Bristol Mine for purposes of depletion was revised and redetermined by the mineral section and other repre-

44 sentatives of the Income Tax Unit of the Internal Revenue Department in conference with duly authorized representatives of said trustees with the result that the basis of valuation of said mine for purposes of depletion was determined by the department as follows:

Ore reserve 3/1/13		3,556,732 Tons
Mined 3/1/13 to 11/29/16		
1913	379,170	
1914	172,006	
1915	378,830	
1916	462,800	1,392,806
Ore reserve 11/29/16		2,163,926
Royalty rate—19 cents		
Gross expected royalty		$411,146.94
Less 3% expected expense		12,334.37
Net expected profit		398,811.57
Factor—6%—4%—9 years— .719198		
None removed from Nov. 29, 1916 to Jan. 1, 1917.		
Value royalties as at Jan. 1, 1917		286,824.48

Less — 1917	188,689 Tons	$25,010.35	
1918	245,280	32,511.37	
1919	58,138	7,706.07	
1920	368,488	48,842.35	
1921	13,555	1,796.69	115,866.83
	874,150		
Residual value—1,289,776 tons at .13255			170,957.65

(f) Said basis of valuation as so determined by the Income Tax Unit was proposed to the representatives of said trustees for acceptance in settlement of the controversy in relation to the matter then pending before said Income Tax Unit and was accepted and expressly agreed to on behalf of said trustees with the understanding that such settlement and determination was subject to the approval of the 45 Commissioner.

(g) Thereafter on March 17, 1925, the trustees received a letter from the Commissioner (IT:PA:3 EPR:301) confirming said determination and basis of valuation for purposes of depletion and advising the trustees of the results of the audit by the Department of their books and accounts for income tax purposes for the years 1917 to 1921 inclusive based on said determination and upon the rates for depletion shown therein.

(h) After the receipt of said letter of March 17, 1925, confirming said settlement and determination of the basis of valuation of said mine for purposes of depletion, the trustees filed returns for the years 1922, 1923 and 1924 on the basis of said determination claiming a deduction of .13255

cents per ton for depletion in accordance therewith and the depletion claimed by them in their said amended return for the year 1923 in accordance with said determination and to which as they are informed and believe, they were lawfully entitled was the sum of $60,279.76.

(i) The facts upon which said rate of depletion was based shown in the statement and computation
46 above referred to, as petitioner is informed and believes, were substantially correct and entitled said trustees to the rate of depletion therein stated, to-wit, .13255 cents per ton.

(j) The ore taken from said mine under said lease for the year 1925 was 454,770 tons which at the rate of depletion established as aforesaid entitled the said trustees to a deduction of $60,279.76.

(k) Since the execution of said trust conveyance it has been the practice of the trustees thereunder as authorized and required by the terms thereof to make distribution of the entire royalties received by them under said lease from time to time among thee bneficiaries of said trust in accordance with their respective interests as before stated after paying or reserving costs of administration and prior charges without reserving from such distribution the portion of such royalties corresponding to the proper allowance for depletion.

(l) In or about the year 1925 the income and profits tax return of petitioner was duly audited by the
47 Department of Internal Revenue for the year 1923 and in determining the taxable income of petitioner for that year derived by her from said trust the deduction of $60,279.76 taken by said trustees for depletion as aforesaid was confirmed, and based thereon an additional tax for said year 1923 was assessed against petitioner which was duly paid by her.

(m) Notwithstanding the foregoing, in the year 1927 the Commissioner undertook to reopen the audit of said return for the year 1923 and upon such reaudit erroneously, as petitioner is advised, disallowed the entire deduction claimed by said trustees for depletion for said year 1923 with the result that $15,069.94 was added to the taxable income of petitioner for the year 1923 and the tax on such additional income is reflected in said notice of deficiency.

(n) With reference to the second assignment of error, the petitioner alleges that prior to the year 1923 and during said year she was the owner of an undivided 3/8ths interest in a certain iron ore mine known as the Gwynn Mine located in

the state of Michigan which was subject to a long term
48 mining lease in the usual form of such leases under which the lessors were entitled to royalty. The other lessors and undivided owners of said mine with their respective interests therein and places of residence were as follows:

Jesse Hoyt Land Company, City of New York..... 3/8
Susan Powell, city of Marquette, Michigan..... 1/8
Charles Cummings, City of Marquette, Michigan..... 1/16
William C. Webber, City of Detroit, Michigan..... 1/16

Petitioner was entitled in the year 1923 to a rate of depletion on her said 3/8th interest in said mine fairly computed in an amount of not less than .5923 per ton. In said year 1923 there was shipped from said mine 28,539 tons of ore which entitled the petitioner to a depletion shown for said year in an amount not less than the sum of $1,690.40. Nevertheless the Commissioner upon an audit or reaudit of the said return of this petitioner for the year 1923 wholly disallowed the deduction of $1,690.40 claimed by petitioner for depletion on account of her interest in said Gwynn Mine thereby adding to the taxable income of petitioner for said year 1923 said sum of $1,690.40 the tax on which additional income is reflected in said tax liability of $7,590.58 shown in said notice of deficiency.

49 (o) Petitioner alleges upon information and belief that said sums of $15,069.94 add $1,690.41 added to the taxable income of petitioner for the year 1923 were not in law or in fact income but represented to that extent a return to the petitioner of her share of the corpus of said Bristol and Gwynn Mines covered by said mining leases and that such additions to the taxable income of petitioner were erroneous.

(p) Petitioner further alleges upon information and belief that by reason of the facts hereinbefore stated the reopening of the audit of the income and profits tax return of petitioner for the year 1923 in the year 1927 was erroneous and without justification.

Wherefore petitioner prays that this Board hear this proceeding; that the deduction for depletion taken by said trustees for the year 1923 for said Bristol Mine be affirmed and allowed, and that the deduction in her return for the year 1923 on account of her interest in said Gwynn Mine be allowed, and that the tax liability of the petitioner, if any, be determined accordingly and in accordance with the facts hereinbefore stated.

CHARLES F. FAWSETT
Counsel for Petitioner.

P. O. Address: 420 East Water St.
Milwaukee, Wis.

50 State of California,
County of Los Angeles. } ss.

IDA LANE SMITH being first duly sworn says she is the petitioner making the foregoing petition; that she has read said petition and is familiar with the contents thereof and that the same is true of her own knowledge except as to matters therein stated to be on information and belief and as to those matters she believes it to be true.

IDA LANE SMITH

Subscribed and sworn to before me this 2nd day of February, 1928.

VERNA C. CHURCHILL
(Seal) *Notary Public, Los Angeles County, California.*

51 EXHIBIT "A".

TREASURY DEPARTMENT
Washington

Dec. 10, 1927.

IT:FAR:B-2
MLR-60D
Mrs. Ida Lane Smith,
411 Terrace Avenue,
Milwaukee, Wisconsin.

Madam:

The determination of your income tax liability for the year 1923 discloses a deficiency in tax amounting to $7,590.58 as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collec-

tor of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:FAR:B-2-MLR-60D. In the event that you acquiesce in a part of the determination the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. B. ALLEN,
Deputy Commissioner.

Enclosures
Statement
Form A
Form 882

52 Statement.

IT:FAR:B-2
MLR-60D

In re: Mrs. Ida Lane Smith
411 Terrace Avenue,
Milwaukee, Wisconsin.

Dec. 10, 1927.

Year	Deficiency
1923	$7,590.58

Changes in income:		
Total net income reported in your return		$46,693.26
Additions:		
(1) Adjustment in Trust Income Pfister, Smith and Mariner, Trustees Reported by Revenue Agent	$17,064.22	
Corrected		32,134.16
(2) Depletion, Gwynn Mine disallowed		1,690.40
(3) Legal expense disallowed		554.34
Deduct		81,072.16
(4) Capital Net Gain Transferred from ordinary income		8,252.05
Ordinary income as adjusted for tax		$72,820.11

Explanation of Changes:

(1) Income from Pfister, Smith and Mariner has been increased from $17,064.22, the amount shown by the Examining officer, to $32,134.16 for the reason that depletion claimed by the trustees has been disallowed as a deduction in the Fiduciary return. This adjustment has been fully explained in a separate communication addressed to the trustees.

(2) Information on file in this office does not indicate that the 3/8 fee interest in the Gwynn mine has ever been assigned to you. The depletion has, therefore, been disallowed. In any event it appears that you would not be entitled to depletion based on the March 1, 1915 value as claimed.

53 (3) Legal expenses in the amount of $554.34 paid in connection with land in Northern Wisconsin has been disallowed for the reason that same is held to be a capital expense.

(4) Profit on sale of property acquired by inheritance in January 1921 has been transferred from ordinary income to capital net gain and the tax computed thereon at 12½% as provided by Section 206 of the Revenue Act of 1921.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

54 EXHIBIT "B".

TREASURY DEPARTMENT
Washington

IT:FAR:B-2
MLR

Dec. 10, 1927.

Pfister, Smith and Mariner, Trustees,
133 Mason Street,
Milwaukee, Wisconsin.

Sirs:

A review of your 1923 return of income, Form 1041, has been completed in connection with an examination of your books of account and records.

The report of the Internal Revenue Agent in Charge at Milwaukee, Wisconsin, dated November 28, 1925, has been reviewed and approved for 1923 with the following exception:

It is found that depletion is not deductible from the distributive income of the trust since the terms of the trust agreement do not appear to meet the requirements outlined in Treasury Decision 2267, ARR 3959 (Cumulative Bulletin

II-2, Page 162), and IT:2218 (Cumulative Bulletin III-2, page 61).

The amount of $60,279.76 deducted for depletion is therefore added to the net income reported in the amended Form 1041, resulting in a revised distributive income of $128,536.66 which will be apportioned among the beneficiaries as follows:

Chas. F. Pfister	$16,067.08
Elmwood Company of Delaware	16,067.08
Ida Lane Smith	32,134.16
J. W. Mariner	32,134.16
A. M. Hoyt and Company	25,707.34
Alice C. Dane	6,426.84

The beneficiaries will be duly notified of the adjustment in their individual income.

Respectfully,
C. B. ALLEN
Deputy Commissioner.
By PORTER LINDER
Head of Division.

1928. 55 * * (Caption 34758) * *

ANSWER.

Filed Mar. 28, 1928.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, admits and denies as follows:

I. Admits the allegations contained in paragraph (I) of the petition.

II. Admits the allegations in paragraph (II) of the petition.

III. Admits the allegations contained in paragraph (III) of the petition.

IV. Denies the Commissioner erred in respect to the matters set forth in subdivisions (1) and (2) of paragraph (IV) of the petition.

V(a). Admits the allegations contained in subdivision (a) of paragraph (V) of the petition.

V(b) The Respondent for the want of information or knowledge sufficient to form a belief as to the remainder of the allegations contained in subdivision (b) of paragraph (V), denies the same.

V(c). Admits that at the time of the execution of said trust conveyance on November 29, 1916, said Bristol Mine
56 was subject to a mining lease, but denies the remainder of the allegations contained in subdivision (c) of paragraph (V) of the petition.

V(d). Denies the allegations contained in subdivision (d) of paragraph)V) of the petition.

V(e). Denies the allegations contained in subdivision (e) of paragraph (V) of the petition.

V(f) Denies the allegations contained in subdivision (f) of paragraph (V) of the petition.

V(g). Denies the allegations contained in subdivision (g) of paragraph (V) of the petition.

V(h). Denies the allegations contained in subdivision (h) of paragraph (V) of the petition.

V(i). Denies the allegations contained in subdivision (i) of paragraph (V) of the petition.

V(j). Denies the allegations contained in subdivision (j) of paragraph (V) of the petition.

V(k). Denies the allegations contained in subdivision (k) of paragraph (V) of the petition.

V(l). Denies the allegations contained in subdivision (l) of paragraph (V) of the petition.

V(m). Admits that the Commissioner disallowed the entire deduction taken by the trustees for depletion in the
57 year 1923, but denies the remainder of the allegations contained in subdivision (m) of paragraph (V) of the petition. Further denies that such disallowance was erroneous.

V(n). Admits the Commissioner disallowed the sum of $1,690.40 as a deduction from gross income for the year 1923, representing alleged depletion taken on the Gwynn Mine, and increased taxable income for 1923 by the said sum of $1,690.40, but denies the remainder of the allegations contained in subdivision (n) of paragraph (V) of the petition.

Specifically denies that any interest in the said Gwynn Mine was ever assigned to the petitioner.

V(o). Denies the allegations contained in subdivision (o) of paragraph (V) of the petition.

V(p). Denies the allegations contained in subdivision (p) of paragraph (V) of the petition.

Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

(Signed) C. M. CHAREST
C. M. Charest,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
SHELBY S. FAULKNER,
Special Attorney, Bureau of Internal Revenue.

5

J. W. Mariner,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 34759.

Appearances:

For Taxpayer: Chas. F. Fawsett, Esq., R. S. Doyle, Esq.

For Comm'r.: P. A. Bayer, Esq.

DOCKET ENTRIES.

1928

Feb. 8—Petition received and filed. Taxpayer notified. (Fee paid)

Feb. 9—Copy of petition served on General Counsel.

Mar. 28—Answer filed by General Counsel.

Mar. 29—Copy of answer served on taxpayer. General Calendar.

1929

Aug. 30—Notice of the appearance of R. S. Doyle, attorney for taxpayer. See 28070.

1930

Jan. 4—Hearing set February 26, 1930.

Feb. 19—Motion to continue to April 28, 1930, filed by taxpayer. See 34678. February 20, 1930 granted.

Apr. 23—Motion to continue to May 21, 1930 filed by taxpayer. See 28070. April 25, 1930 granted to May 21, 1930.

Apr. 28—Motion to place on Field Calendar filed by taxpayer. April 30, 1930 granted.

May 21—Hearing set July 8, 1930 at Milwaukee, Wisc.

Jul. 8—Hearing held before Stephen J. McMahon, Div. 16 on merits. Stipulation of facts received. Consolidated with 34678, 35815, 34758, 40426 and 41089. Briefs due Oct. 1, 1930.

July 25—Transcript of hearing of July 8, 1930, filed.
Sep. 10—Motion for extension to Nov. 1, 1930 to file brief, filed by taxpayer. September 11, 1930 granted.
Oct. 1—Brief filed by General Counsel. See 28070.
Oct. 21—Motion for extension to December 1, 1930 to file brief, filed by taxpayer. October 22, 1930 granted.
Nov. 14—Brief filed by taxpayer.

1931

Oct. 7—Findings of fact and opinion rendered, S. J. McMahon, Div. 16. Judgment will be entered for respondent.
Oct. 9—Decision entered, S. J. McMahon, Div. 16.

1932

Feb. 24—Stipulation consolidating dockets 28070, 34678, 34758, 34759, 35815, 40426 and 41089 for petition for review, filed.
Feb. 24—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error, filed by taxpayer.
Feb. 24—Proof of service filed.
Feb. 24—Praecipe filed with proof of service thereon.

58 * * (Caption 34759) * *

PETITION.

Filed Feb. 8, 1928.

The above named petitioner hereby petitions for redetermination of the proposed deficiency in tax of $6,281.54 against him for the year 1923 set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:FAR:B-2, MLR-60D) dated December 19, 1927, and as a basis of his proceeding alleges as follows:

I. The petitioner is a resident of the city of Milwaukee and a citizen of the state of Wisconsin. His post office address is 133 Mason Street, Milwaukee, Wisconsin.

59 II. The notice of deficiency, a copy of which is attached and marked Exhibit "A" referred to above, is dated December 10, 1927, and was on that date mailed to the petition at his said post office address.

III. The taxes in controversy are income and profits taxes claimed to be due from the petitioner for the calendar year 1923 and the amount of such taxes in dispute is so much of said sum of $6,281.54 as resulted from the addition of $27,113.63 to the taxable income of the petitioner as the re-

sult of the adjustment of income from Pfister, Smith and Mariner, Trustees, shown in the acompanying statement which is a part of said Exhibit "A", and from the disallowance of the item "Loss on Stock" amounting to $4,875.00 shown in said statement.

IV. The determination of tax set forth in said notice is based upon the following errors:

(1) The Commissioner erred in disallowing the deduction of $60,279.76 claimed in the return filed by Pfister, Smith and Mariner, Trustees, for the year 1923 as depletion of an iron ore mine which was the subject of the trust referred
60 to in said return, and of which trust the petitioner was one of the beneficiaries, with the result that the sum of $27,113.63 was erroneously added to the taxable income of petitioner for said year 1923. A copy of the notice of the Commissioner to the said Pfister, Smith and Mariner, Trustees, dated December 10, 1927, disallowing said claimed deduction of $60,279.76 is attached hereto, marked Exhibit "B" and made part hereof.

(2) The Commissioner erred in refusing to allow as a deduction from the petitioner's taxable income for the year 1923 the sum of $4,875.00, "Loss on Stock" referred to in Exhibit "A" hereto annexed.

V. The facts upon which petitioner relies as the basis for this proceeding are as follows:

(a) In the year 1923 and prior thereto a certain iron ore mine located in the state of Michigan known as the Bristol Mine was held in trust by the petitioner and two other trustees under which the petitioner was one of the beneficiaries.

(b) The provisions of the trust conveyance by which said trust was created in so far as material to this proceeding were in substance as follows:
61 Said instrument was made, executed and delivered November 29, 1916, by which certain real estate in Michigan including said mine was conveyed to the trustees of which the said petitioner was one, in trust, with full powers of sale, management and control and providing that after the payment of costs of administration and prior charges,

"All proceeds which shall come to the hands of the trustees from said property or from any use which may be made thereof, or from any source whatsoever hereunder as received by the trustees shall belong to and be the property of the beneficiaries hereunder, to be distributed and paid over to them in proportion to and in accordance with their re-

spective interests as shown herein or as the same shall from time to time appear as hereinafter provided.

The beneficiaries of the trust hereby created and hereinbefore referred to and their respective interests hereunder at the time of the execution and delivery of this instrument are as follows:

Jesse Hoyt Smith	
Lucinda W. Mariner	1/4
John W. Mariner	1/8
Charles F. Pfister	1/8
Louise F. Vogel	1/8
Executors and trustees under the last will and testament of Jesse Hoyt, deceased,	1/8
	1/4."

Prior to the year 1923 the above named Lucinda W. Mariner died, and the petitioner succeeded to her 1/8th
62 interest under said trust since which time and during the year 1923 his beneficial interest under said trust was 1/4th.

(c) At the time of the execution of said trust conveyance, to-wit, November 29, 1916, said Bristol Mine was subject to a mining lease for a term of upwards of 15 years, exceeding the life of said mine on the basis of estimated ore reserves and the established rules for determining the life of said mine, so that during the term of said lease it could be assumed that all of the ore in said mine would be taken out and disposed of under said lease.

(d) The sole income and entire proceeds derived from the trust estate since the execution of said trust conveyance has been the royalties payable by the lessees under said lease to the owners of the fee, who after said trust conveyance were the trustees under said conveyance. The royalty rate reserved in said lease was 19 cents per ton.

(e) In or about the month of February, 1925, in connection with the audit of the accounts of the trustees for the years 1917, 1918, 1919, 1920 and 1921 the basis of valua-
63 tion of said Bristol Mine for purposes of depletion was revised and redetermined by the mineral section and other representatives of the Income Tax Unit of the Internal Revenue Department in conference with duly authorized representatives of said trustees with the result that the basis of valuation of said mine for purposes of depletion was determined by the department as follows:

Ore reserve 3/1/13			3,556,732 Tons
Mined 3/1/13 to 11/29/16			
1913	379,170		
1914	172,006		
1915	378,830		
1916	462,800		1,392,806
Ore reserve 11/29/16			2,163,926
Royalty rate—19 cents			
Gross expected royalty			$411,146.94
Less 3% expected expense			12,334.37
Net expected profit			398,811.57
Factor—6%—4%—9 years—.719198			
None removed from Nov. 29, 1916 to Jan. 1, 1917			
Value royalties as at Jan. 1, 1917			286,824.48
Less—1917	188,689 Tons	$ 25,010.35	
1918	245,280	32,511.37	
1919	58,138	7,706.07	
1920	368,488	48,842.35	
1921	13,555	1,796.69	115,866.83
	874,150		
Residual value—1,289,776 tons at .13255			170,957.65

(f) Said basis of valuation as so determined by the Income Tax Unit was proposed to the representatives of said trustees for acceptance in settlement of the controversy in relation to the matter then pending before said Income
64 Tax Unit and was accepted and expressly agreed to on behalf of said trustees with the understanding that such settlement and determination was subject to the approval of the Commissioner.

(g) Thereafter on March 17, 1925, the trustees received a letter from the Commissioner (IT:PA:3 EPR:301) confirming said determination and basis of valuation for purposes of depletion and advising the trustees of the results of the audit by the Department of their books and accounts for income tax purposes for the years 1917 to 1921 inclusive based on said determination and upon the rates for depletion shown therein.

(h) After the receipt of said letter of March 17, 1925, confirming said settlement and determination of the basis of valuation of said mine for purposes of depletion, the trustees filed returns for the years 1922, 1923 and 1924 on the basis

of said determination claiming a deduction of .13255 cents per ton for depletion in accordance therewith and the depletion claimed by them in their said amended return for the year 1923 in accordance with said determination and to which as they are informed and believe, they were lawfully entitled was the sum of $60,279.76.

65 (i) The facts upon which said rate of depletion was based shown in the statement and computation above referred to, as petitioner is informed and believes, were substantially correct and entitled said trustees to the rate of depletion therein stated, to-wit, .13255 cents per ton.

(j) The ore taken from said mine under said lease for the year 1923 was 454,770 tons which at the rate of depletion established as aforesaid entitled the said trustees to a deduction of $60,279.76.

(k) Since the execution of said trust conveyance it has been the practice of the trustees thereunder as authorized and required by the terms thereof to make distribution of the entire royalties received by them under said lease from time to time among the beneficiaries of said trust in accordance with their respective interests as before stated after paying or reserving costs of administration and prior charges without reserving from such distribution the portion of such royalties corresponding to the proper allowance for depletion.

(l) In the year 1925 the income and profits tax return of petitioner for the year 1923 was duly audited

66 by the Department of Internal Revenue and in determining the taxable income of petitioner for that year derived by him from said trust, the deduction of $60,279.76 taken by said trustees for depletion as aforesaid was accepted and confirmed by the Commissioner and based thereon the income derived by petitioner from said trust for the year 1923 was adjusted at the sum of $17,064.22 which adjustment is accepted by petitioner and the additional assessment based on said audit of his said return for the year 1923 is ready to be paid on demand.

(m) Notwithstanding the foregoing, in the year 1927 the Commissioner undertook to reopen the audit of said return of petitioner for the year 1923 and upon such reaudit erroneously disallowed the entire deduction claimed by said trustees for depletion for said year 1923 with the result that $5,1069.94 was added to the taxable income of petitioner for the year 1923 and the tax thereon is reflected in said claimed deficiency tax of $6,281.54 shown in said notice of deficiency.

(n) Petitioner alleges upon information and belief that said sum of $15,069.94 added to the taxable income of petitioner for the year 1923 as aforesaid was not in law
67 or in fact income but represented to that extent a return to the petitioner of his share of the corpus of the trust estate held by said trustees and that such addition to his taxable income was erroneous.

(o) Petitioner further alleges upon information and belief that by reason of the facts hereinbefore stated the determination of the valuation of said mine for purposes of depletion and the depletion rate as aforesaid and the audit of the return of petitioner for 1923 made in the year 1925 and the readiness to make payment of the additional assessment based on said audit as aforesaid should be held to be binding and conclusive upon the Commissioner, and that the reopening of said audit in the year 1927 was erroneous and without justification.

(p) With reference to the assignment of error numbered (2), the petitioner alleges that said item of $4,875.00 disallowed as shown in the statement attached to said Exhibit "A" represented an investment of that amount in the stock of the Grant Marble Company, a Wisconsin corporation, sometime prior to the year 1923. In the year 1923 upon inquiry the petitioner learned that said stock was worthless
68 and caused the same to be charged off on his books accordingly. Said investment was made for profit as a business transaction and turned out to be an actual and total loss ascertained to be such by petitioner in the year 1923 and the disallowance thereof by the Commissioner is claimed to be error.

Wherefore petitioner prays that this Board hear this proceeding; that the deduction for depletion taken by said trustees for the year 1923 be affirmed and allowed and that the tax liability of petitioner for said year be redetermined accordingly; that said item of $4,875.00 erroneously disallowed by the Commissioner be allowed the petitioner as a loss in the year 1923 and that the tax liability of the petitioner, if any, be determined in accordance with the facts hereinbefore stated.

CHARLES F. FAWSETT,
Counsel for Petitioner

P. O. Address: 425 East Water Street,
Milwaukee, Wisconsin.

69 State of California, }
County of Los Angeles. } ss.

J. W. MARINER being first duly sworn says he is the petitioner making the foregoing petition; that he has read said petition and is familiar with the contents thereof and that the same is true of his own knowledge except as to matters therein stated to be on information and belief and as to those matters he believes it to be true.

JOHN W. MARINER.

Subscribed and sworn to before me this 2nd day of February, 1928.

(Seal) JOSEPH REED,
Notary Pubilc, Los Angeles County, California.

My commission expires June 30, 1928.

70 EXHIBIT "A".

TREASURY DEPARTMENT
Washington

IT:FAR:B-2-60D
MLR

Dec. 10, 1927.

Mr. J. W. Mariner,
133 Mason Street,
Milwaukee, Wisconsin.

Sir:

The determination of your income tax liability for the taxable year 1923, discloses a deficiency in tax amounting to $6,281.54, for the year 1923, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition

and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C. for the attention of IT:FAR:B-2-60D-MLR.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,
D. H. BLAIR,
Commissioner,
By C. B. ALLEN,
Deputy Commissioner.

Enclosures:
Statement
Form A

71 IT:FAR:B-2-60D
MLR

Statement.

Dec. 10, 1927.

In re: Mr. J. W. Mariner,
133 Mason Street,
Milwaukee, Wisconsin.

Year	Deficiency
1923	$6,281.54

The report of the Internal Revenue Agent in Charge at Milwaukee, Wisconsin, dated December 1, 1925, has been reviewed and your taxable net income has been adjusted as follows:

Total net income reported in your return		$16,724.32
Add:		
1. Adjustment of income from Pfister, Smith and Mariner—		
Reported	$ 5,020.43	
Corrected	32,134.16	27,113.63

Deductions disallowed—		
2. Loss on stock	4,875.00	
3. Annuity paid to sister-in-law	4,000.00	
4. Amount paid to Mrs. Brooks	1,212.50	
5. Lawyers fees	35.00	37,236.13
Total		$53,960.45
Deduct:		
6. Adjustment for contributions:		
Claimed	2,951.34	
Allowable	2,975.00	23.66
		53,936.79

72 Explanation of Changes.

1. Income from Pfister, Smith and Mariner, has been increased from $5,020.43 to $32,134.16, instead of $17,064.22, as shown by the examining officer. This is due to the fact that depletion claimed on Form 1041 has been disallowed as a deduction on the fiduciary return. This adjustment has been fully explained in a separate communication addressed to Pfister, Smith and Mariner.

2. The loss of $4,875.00 on stock of the Grant Marble Company has been disallowed for the reason that this stock was determined worthless prior to 1923.

3. The annuity of $4,000.00 paid to your sister-in-law for her interest in her husband's estate does not constitute an allowable deduction for income tax purposes.

4. The amount of $1,212.50 paid to Mr. Brooks in connection with an Inheritance tax report for the Estate of your Mother, Lucinda W. Mariner, is not an allowable deduction, on the return of a beneficiary. If such a deduction were allowable for income tax purposes it would be necessary that the same be claimed on the return filed for the estate. Inasmuch as you state that the amount was paid by you after the estate was closed and at a time when the Government sought to collect further tax by increasing the valuations placed on the estate property, it appears that the expenditure thus became a capital item in the nature of an amount paid for protecting your interests in the estate and would serve to reduce your share of the corpus.

5. The lawyer's fee of $35.00 for making your Will is purely a personal expense and the deduction is accordingly disallowed.

6. Inasmuch as your income has been increased by $37,236.13, as the result of the foregoing adjustments, contribu-

tions originally limited by you to 15% of your taxable net income have been allowed in the full amount of $2,975.00.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

73 EXHIBIT "B".

TREASURY DEPARTMENT.
Washington

Dec. 10, 1927.

IT:FAR:B-2
MLR
Pfister, Smith and Mariner, Trustees,
133 Mason Street,
Milwaukee, Wisconsin.

Sirs:

A review of your 1923 return of income, Form 1041, has been completed in connection with an examination of your books of account and records.

The report of the Internal Revenue Agent in Charge at Milwaukee, Wisconsin, dated November 28, 1925, has been reviewed and approved for 1923 with the following exception:

It is found that depletion is not deductible from the distributive income of the trust since the terms of the trust agreement do not appear to meet the requirements outlined in Treasury Decision 2267, ARR 3959 (Cumulative Bulletin II-2, Page 162), and IT:2218 (Cumulative Bulletin III-2, page 61).

The amount of $60,279.76 deducted for depletion is therefore added to the net income reported in the amended Form 1041, resulting in a revised distributive income of $128,536.66 which will be apportioned among the beneficiaries as follows:

Chas. F. Pfister	$16,067.08
Elmwood Company of Delaware	16,067.08
Ida Lane Smith	32,134.16
J. W. Mariner	32,134.16
A. M. Hoyt and Company	25,707.34
Alice C. Dane	6,426.84

The beneficiaries will be duly notified of the adjustment in their individual income.

Respectfully,
C. B. ALLEN,
Deputy Commissioner,
By PORTER LINDER,
Head of Division.

74 * * (Caption 34759) * *

ANSWER.

Filed Mar. 28, 1928.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, admits and denies as follows:

I. Admits the allegations contained in paragraph (I) of the petition.

II. Admits the allegations contained in paragraph (II) of the petition.

III. Admits the allegations contained in paragraph (III) of the petition.

IV. Denies the Commissioner erred in respect to the matters set forth in subdivisions (1) and (2) of paragraph (IV) of the petition.

V(a). Admits the allegations contained in subdivision (a) of paragraph (V) of the petition.

V(b). The Respondent for the want of information and knowledge sufficient to form a belief as to the allegations contained in subdivision (b) of paragraph (V), denies the same.

75 V(c). Admits that at the time of the execution of said trust conveyance on November 29, 1916, said Bristol Mine was subject to a mining lease, but denies the remainder of the allegations contained in said subdivision (c) of paragraph (V) of the petition.

V(d). Denies the allegations contained in subdivision (d) of paragraph (V) of the petition.

V(e). Denies the allegations contained in subdivision (e) of paragraph (V) of the petition.

V(f). Denies the allegations contained in subdivision (f) of paragraph (V) of the petition.

V(g). Denies the allegations contained in subdivision (g) of paragraph (V) of the petition.

V(h). Denies the allegations contained in subdivision (h) of paragraph (V) of the petition.

V(i). Denies the allegations contained in subdivision (i) of paragraph (V) of the petition.

V(j). Denies the allegations contained in subdivision (j) of paragraph (V) of the petition.

V(k). Denies the allegations contained in subdivision (k) of paragraph (V) of the petition.

V(l). Denies the allegations contained in subdivision (l) of paragraph (V) of the petition.

V(m). Admits that the Commissioner disallowed the entire deduction taken by the trustees for depletion in the
76 year 1923, but denies the remainder of the allegations contained in subdivision (m) of paragraph (V) of the petition. Further denies that such disallowance was erroneous.

V(n). Denies the allegations contained in subdivision (n) of paragraph (V) of the petition.

V(o). Denies the allegations contained in subdivision (o) of paragraph (V) of the petition.

V(p). Denies the allegations contained in subdivision (p) of paragraph (V) of the petition.

Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

(Signed) C. M. CHAREST,
C. M. Charest,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
SHELBY S. FAULKNER,
Special Attorney, Bureau of Internal Revenue.

6 The Elmwood Company of Delaware, *Petitioner,* vs. Commissioner of Internal Revenue, *Respondent.* } Docket No. 35815.

Appearances:

For Taxpayer: Chas. F. Fawsett, Esq., R. S. Doyle, Esq.

For Comm'r.: P. A. Bayer, Esq.

DOCKET ENTRIES.

1928

Feb. 27—Petition received and filed. Taxpayer notified. (Fee paid).

Feb. 28—Copy of petition served on General Counsel.
Apr. 16—Answer filed by General Counsel.
Apr. 17—Copy of answer served on taxpayer. General Calendar.

1929

Aug. 30—Notice of appearance of R. S. Doyle as counsel for taxpayer filed.

1930

Jan. 4—Hearing set Feb. 26, 1930.
Feb. 19—Motion for continuance to April 28, 1930 filed by taxpayer. (34678).
Feb. 20—Motion granted and set for hearing on April 28, 1930.
Apr. 23—Motion to continue to May 21, 1930 filed by taxpayer. See 28070. April 25, 1930 granted to May 21, 1930.
Apr. 28—Motion to transfer to the Milwaukee, Wisc. Circuit Calendar, filed by taxpayer.
Apr. 30—Motion granted.
May 21—Hearing set July 8, 1930, Milwaukee, Wisc.
Jul. 8—Hearing had before Stephen J. McMahon, Div. 16 on merits. For record of exhibits set docket 28070. Stipulation of facts received. Consolidated for hearing and decision with dockets 28070, 34678, 34758, 34759, 40426 and 41089. Briefs due Oct. 1, 1930.
Jul. 25—Transcript of hearing of July 8, 1930, filed.
Sep. 10—Motion for extension to Nov. 1, 1930 to file brief, filed by taxpayer. Sept. 11, 1930 granted.
Oct. 1—Brief filed by General Counsel.
Oct. 21—Motion for extension to Dec. 1, 1930 to file brief, filed by taxpayer. Oct. 22, 1930 granted.
Nov. 14—Brief filed by taxpayer.

1931

Oct. 7—Findings of fact and opinion rendered. Stephen J. McMahon, Div. 16. Judgment will be entered for the respondent.
Oct. 9—Decision entered, Stephen J. McMahon, Div. 16.

1932

Feb. 24—Stipulation to consolidate with dockets 28070, 34678, 34758, 34759, 40426 and 41089 for the purpose for review, filed.
Feb. 24—Petition for review to U. S. Circuit Court of Appeals (7) with assignments of error, filed by taxpayer.
Feb. 24—Proofs of service filed.
Feb. 24—Praecipe with proof of service thereon filed.

1928. 77 * * (Caption 35815) * *

PETITION.

Filed Feb. 27, 1928.

The above named petitioner hereby petitions for redetermination of the proposed deficiency in tax of $941.27 against the petitioner for the year 1923 as set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:FAR:A6 EIM:60D) dated January 7, 1928 and as a basis of its proceeding alleges as follows:

I.

The above named petitioner is a corporation duly organized and existing under the laws of Delaware.

78 II.

The notice of deficiency a copy of which is attached marked Exhibit "A" referred to above is dated and was mailed to the petitioner January 7, 1928.

III.

The taxes in controversy are income and profits taxes claimed to be due from the petitioner for the calendar year 1923 and the amount of such taxes in dispute is the entire amount claimed as a deficiency in said notice, to-wit, the sum of $941.27.

IV.

The determination of said tax set forth in said notice is based upon the following errors, namely:

(1) The Commissioner erred in disallowing the deduction of $60,279.76 claimed in the return filed by Pfister, Smith and Mariner, Trustees, for the year 1923 as depletion of an iron ore mine which was the subject of the trust referred to in said return with the result that one-eighth of said amount,
79 being the beneficial interest of the petitioner under said trust was erroneously added to the taxable income of the petitioner for the year 1923 as shown by said Exhibit "A" hereto annexed. A copy of the notice of the Commissioner to the said Pfister, Smith and Mariner, Trustees, dated December 10, 1927, disallowing said claimed deduction of $60,279.76 is hereto attached marked Exhibit "B" and made part thereof.

(2) The Commissioner erred in determining that there is any deficiency in tax due from petitioner for the year 1923.

V.

The facts upon which petitioner relies as the basis of its proceeding are as follows:

(a) In the year 1923 and prior thereto a certain iron ore mine located in the state of Michigan known as the Bristol Mine was held in trust by three trustees.

(b) The provisions of the trust conveyance by which said trust was created in so far as material to this proceeding were in substance as follows:

80 Said instrument was made, executed and delivered November 29, 1916, by which certain real estate in Michigan including said mine was conveyed to the trustees above referred to or their predecessors in trust with full powers of sale, management and control and providing that after the payment of the costs of administration and prior charges:

"All proceeds which shall come to the hands of the trustees from said property or from any use which may be made thereof, or from any source whatsoever hereunder as received by the trustees shall belong to and be the property of the beneficiaries hereunder, to be distributed and paid over to them in proportion to and in accordance with their respective interests as shown herein or as the same shall from time to time appear as hereinafter provided.

The beneficiaries of the trust hereby created and hereinbefore referred to and their respective interests hereunder at the time of the execution and delivery of this instrument are as follows:

Jesse Hoyt Smith —	1/4
Lucinda W. Mariner—	1/8
John W. Mariner—	1/8
Charles F. Pfister—	1/8
Louise F. Vogel—	1/8
Executors and trustees under the last will and testament of Jesse Hoyt, deceased—	1/4."

The petitioner has succeeded to and was in the year 1923 and is now the owner of the 1/8th interest of Louise F. Vogel referred to above.

(c) At the time of the execution of said trust conveyance, to-wit, November 29th, 1916, said Bristol Mine was sub-
81 ject to a mining lease for a term of upwards of 15 years, exceeding the life of said mine on the basis of estimated

ore reserves and the established rules for determining the life of said mine, so that during the term of said lease it could be assumed that all of the ore in said mine would be taken out and disposed of under said lease.

(d) The sole income and entire proceeds derived from the trust estate since the execution of said trust conveyance has been the royalties payable by the lessees under said lease to the owners of the fee, who after said trust conveyance were the trustees under said conveyance. The Royalty rate reserved in said lease was 19 cents per ton.

(e) In or about the month of February, 1925, in connection with the audit of the accounts of the trustees for the years 1917, 1918, 1919, 1920 and 1921 the basis of valuation of said Bristol Mine for purposes of depletion was revised and redetermined by the mineral section and other representatives of the Income Tax Unit of the Internal Revenue Department in conference with duly authorized representa-
82 tives of said trustees with the result that the basis of valuation of said mine for purposes of depletion was determined by the department as follows:

Ore reserve 3/1/13			3,556,732 Tons
Mined 3/1/13 to 11/29/16			
1913	379,170		
1914	172,006		
1915	378,830		
1916	462,800		1,392,806
Ore reserve 11/29/16			2,163,926
Royalty rate—19 cents			
Gross expected royalty			$411,146.94
Less 3% expected expense			12,334.37
Net expected profit			398,811.57
Factor—6%—4%—9 years—.719198			
None removed from Nov. 29, 1916 to Jan. 1, 1917			
Value royalties as at Jan. 1, 1917			286,824.48
Less—1917	188,689 Tons	$25,010.35	
1918	245,280	32,511.37	
1919	58,138	7,706.07	
1920	368,488	48,842.35	
1921	13,555	1,796.69	115,866.83
	874,150		
Residual value—1,289,776 tons at .13255			170,957.65

(f) Said basis of valuation as so determined by the Income Tax Unit was proposed to the representatives of said trustees for acceptance in settlement of the controversy in relation to the matter then pending before said Income Tax Unit and was accepted and expressly agreed to on behalf of said trustees with the understanding that such settlement and determination was subject to the approval of the Commissioner.

83 (g) Thereafter on March 17, 1925, the trustees received a letter from the Commissioner (IT:PA:3 EPR: 301) confirming said determination and basis of valuation for purposes of depletion and advising the trustees of the results of the audit by the Department of their books and accounts for income tax purposes for the years 1917 to 1921 inclusive based on said determination and upon the rates for depletion shown therein.

(h) After the receipt of said letter of March 17, 1925, confirming said settlement and determination of the basis of valuation of said mine for purposes of depletion, the trustees filed returns for the years 1922, 1923 and 1924 on the basis of said determination claiming a deduction of .13255 cents per ton for depletion in accordance therewith and the depletion claimed by them in their said amended return for the year 1923 in accordance with said determination and to which as they are informed and believe, they were lawfully entitled was the sum of $60,279.76.

(i) The facts upon which said rate of depletion was based shown in the statement and computation above referred to,

84 as petitioner is informed and believes, were substantially correct and entitled said trustees to the rate of depletion therein stated, to-wit, .13255 cents per ton.

(j) The ore taken from said mine under said lease for the year 1923 was 454,770 tons which at the rate of depletion established as aforesaid entitled the said trustees to a deduction of $60,279.76.

(k) Since the execution of said trust conveyance it has been the practice of the trustees thereunder as authorized and required by the terms thereof to make distribution of the entire royalties received by them under said lease from time to time among the beneficiaries of said trust in accordance with their respective interests as before stated after paying or reserving costs of administration and prior charges without reserving from such distribution the portion of such royalties corresponding to the proper allowance for depletion.

(l) In or about the year 1925 the income and profits tax return of the petitioner for the year 1923 was audited by the

department of internal revenue and in determining the
85 taxable income of the petitioner for that year derived by it from said trust the deduction of $60,279.76 taken by said trustees for depletion as aforesaid was accepted and confirmed and on the basis thereof and on the other facts disclosed in the return of petitioner for said year 1923 the deficiency in tax for said year 1923 was duly determined and was thereafter paid by the petitioner.

(m) Notwithstanding the foregoing, in the year 1927 the Commissioner undertook to reopen the audit of said return of petitioner and the determination of said deficiency for the year 1923 and upon such result erroneously disallowed the entire deduction claimed by said trustees for depletion for said year 1923 and redetermined the claimed deficiency in tax against the petitioner on the basis of such disallowance as shown in said notice, Exhibit "A".

(n) Petitioner alleges upon information and belief that the amount added to its taxable income for the year 1923 by reason of the disallowance to said trustees of said deduction of $60,279.76 for depetion was not in law and in fact income but represented a return to the petitioner by the trustees
86 under said trust conveyance pro tanto of its share of the corpus of the trust estate held by said trustees and that such addition to the taxable income of petitioner was erroneous.

(o) Petitioner further alleges upon information and belief that by reason of the facts hereinbefore stated the determination of the valuation of said mine for purposes of depletion and the depletion rates as aforesaid and the determination of the deficiency in tax based thereon for the year 1923 before referred to and the payment by the petitioner of the additional assessment based thereon as aforesaid should be held to be binding and conclusive upon the Commissioner, and that the reopening of said audit and determination of deficiency was erroneous and without justification.

Wherefore petitioner prays that this Board hear this proceeding; that the deduction for depletion taken by said trustees for the year 1923 be affirmed and allowed and that the tax liability of the petitioner for said year 1923 be redetermined accordingly, and that it be determined that the
87 petitioner is not liable for any deficiency in tax for said year 1923.

CHARLES F. FAWSETT
Counsel for Petitioner.

P. O. Address:
425 East Water Street,
Milwaukee, Wisconsin.

State of Wisconsin, }
Milwaukee County. } ss.

FRED VOGEL, JR., being first duly sworn, deposes and says that he is one of the officers, to wit, the Secretary of Elmwood Company of Delaware, the petitioner making the foregoing petition; that he makes this vertification as such officer for said petitioner and is duly authorized so to do; that he has read said petition and is familiar with the contents thereof and that the same is true of his own knowledge except as to matters therein stated on information and belief and as to those matters he believes them to be true.

FRED VOGEL, JR.

Subscribed and sworn to before me this 24 day of February, A. D. 1928.

(Seal)

OSCAR E. NELL,
Notary Public, Milwaukee County, Wisconsin.

88

EXHIBIT "A".

TREASURY DEPARTMENT
Washington

Jan. 7, 1928.

IT:FAR:A6
EIM:60D
Elmwood Company of Delaware,
C/o First Trust and Savings Bank,
Chicago, Illinois.

Sirs:

The determination of your tax liability for the year 1923 discloses a deficiency of $941.27 as shown by the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C. and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assess-

ment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C. for the attention of IT:FAR:A6-EIM:60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner,
By C. B. ALLEN,
Deputy Commissioner.

Inclosures:
Statement
Form A
Form 882

89 Statement.

IT:FAR:A6
EIM-60D

In re: Elmwood Company of Delaware
C/O First Trust and Savings Bank
Chicago, Illinois.

Year	Deficiency in Tax
1923	941.27

1923

Net income as per return			94,088.12
1. Liquidated dividend Ontonagon and Buele	$2,993.70		
Barth Manufacturing Co.	698.48		
Calumet Land Company	4,536.00		
2. Additional distributive share from Pfister, Smith and Mariner	13,556.86		
3. Disallowance of proportionate share of loss in the operations of Pfister and Mariner Lands	733.96		22,519.00
			116,607.12

Explanation of Items Changed.

1. These amounts represent liquidating dividends received during 1923 and are held to be taxable income since they represent cash distribution over cost of each investment. Article 1544, Regulation 62

2. An audit of the amended return of the Pfister, Smith and Mariner Trustees for 1923 has ben made, and the net income was increased $60,279.76, representing depletion disallowed. The corrected net income of the Trust is $128,536.66 of which the Elmwood Company of Delaware holds a 1/8 interest.

1/8 of $128,536.66	$16,067.08
Amount of income reported from Trust	2,510.22
	13,556.86

90 3. Loss on Pfister and Mariner lands disallowed and this is a joint ownership and the corporation acts as a holding company for Mrs. Louise F. Vogel.

Computation of Tax.

Net Income	$116,607.12
Tax at 12½%	14,575.89
Tax previously assessed	13,634.62
Additional Tax	941.27

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him.

91 EXHIBIT "B".

TREASURY DEPARTMENT
Washington

Dec. 10, 1927.

IT:FAR:B-2
MLR
Pfister, Smith and Mariner, Trustees,
133 Mason Street,
Milwaukee, Wisconsin.

Sirs:

A review of your 1923 return of income Form 1041, has been completed in connection with an examination of your books of account and records.

The report of the Internal Revenue Agent in Charge at

Milwauke, Wisconsin, dated November 28, 1925, has been reviewed and approved for 1923 with the following exception:

It is found that depletion is not deductible from the distributive income of the trust since the terms of the trust agreement do not appear to meet the requirements outlined in Treasury Decision 2267, ARR 3959 (Cumulative Bulletin II-2, Page 162) and IT:2218 (Cumulative Bulletin III-2, Page 61).

The amount of $60,279.76 deducted for depletion is therefore added to the net income reported in the amended Form 1041, resulting in a revised distributive income of $128,536.66 which will be apportioned among the beneficiaries as follows:

Chas. F. Pfister	$16,067.08
Elmwood Company of Delaware	16,067.08
Ida Lane Smith	32,134.16
J. W. Mariner	32,134.16
A. M. Hoyt and Company	25,707.34
Alice C. Dane	6,426.84

The beneficiaries will be duly notified of the adjustment in their individual income.

Respectfully,

C. B. ALLEN,
Deputy Commissioner.
By PORTER LINDER,
Head of Division.

92 * * * (Caption 35815) * *

ANSWER.

Filed Apr. 16, 1928.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, admits and denies as follows:

I. Admits the allegations contained in paragraph (I) of the petition.

II. Admits the allegations contained in paragraph (II) of the petition.

III. Admits the allegations contained in paragraph (III) of the petition.

IV. Denies the Commissioner erred in respect to the matters set forth in subdivisions (1) and (2) of paragraph (IV) of the petition.

V(a). Admits the allegations contained in subdivision (a) of paragraph (V) of the petition.

V(b). The Respondent for the want of information and

knowledge sufficient to form a belief as to the allegations contained in subdivision (b) of paragraph (V), denies the same.

93 V(c). Admits that at the time of the execution of said trust conveyance on November 29, 1916, said Bristol Mine was subject to a mining lease, but denies the remainder of the allegations contained in said subdivision (e) of paragraph (V) of the petition.

V(d). Denies the allegations contained in subdivision (d) of paragraph (V) of the petition.

V(e). Denies the allegations contained in subdivision (e) of paragraph (V) of the petition.

V(f). Denies the allegations contained in subdivision (f) of paragraph (V) of the petition.

V(g). Denies the allegations contained in subdivision (g) of paragraph (V) of the petition.

V(h). Denies the allegations contained in subdivision (h) of paragraph (V) of the petition.

V(i). Denies the allegations contained in subdivision (i) of paragraph (V) of the petition.

V(j). Denies the allegations contained in subdivision (j) of paragraph (V) of the petition.

V(k). Denies the allegations contained in subdivision (k) of paragraph (V) of the petition.

V(l). Denies the allegations contained in subdivision (l) of paragraph (V) of the petition.

V(m). Admits that the Commissioner disallowed the entire deduction taken by the trustees for depletion in the
94 year 1923, but denies the remainder of the allegations contained in subdivision (m) of paragraph (V) of the petition. Further denies that such disallowance was erroneous.

V(n). Denies the allegations contained in subdivision (n) of paragraph (V) of the petition.

V(o). Denies the allegations contained in subdivision (o) of paragraph (V) of the petition.

Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of of Internal Revenue.

Of Counsel:
SHELBY S. FAULKNER,
Special Attorney, Bureau of Internal Revenue.

7 Ida Lane Smith, *Petitioner,*
vs.
Commissioner of Internal Revenue, *Respondent.* } Docket No. 40426.

Appearances:

For Taxpayer: Charles F. Fawsett, Esq., R. S. Doyle, Esq.

For Comm'r.: P. A. Bayer, Esq.

DOCKET ENTRIES.

1928

Aug. 24—Petition received and filed. Taxpayer notified. (Fee paid)

Aug. 25—Copy of petition served on General Counsel.

Oct. 6—Answer filed by General Counsel.

Oct. 10—Copy of answer served on taxpayer. General Calendar.

1929

Aug. 30—Notice of the appearance of R. S. Doyle, attorney for taxpayer. See 28070.

1930

Jan 4—Hearing set Feb. 26, 1930.

Feb. 19—Motion for continuance to April 28, 1930 filed by taxpayer. (28070)

Feb. 20—Motion granted and set for hearing on April 28, 1930.

Apr. 23—Motion for continuance to May 21, 1930 filed by taxpayer. April 25, 1930 granted to May 21, 1930.

Apr. 28—Motion to transfer to the Milwaukee, Wisc. Circuit Calendar, filed by taxpayer. April 30, 1930 granted.

May 21—Hearing set July 8, 1931, Milwaukee, Wisc.

Jul. 8—Hearing had before Stephen J. McMahon, Div. 16 on merits. Submitted. Exhibits see Dkt. 28070. Stipulation of facts received. Consolidated for hearing and decision with dockets 28070, 34678, 35815, 34758, 34759 and 41089. Briefs due Oct. 1, 1930.

Jul. 25—Transcript of hearing of July 8, 1930, filed.

Sep. 10—Motion for extension to Nov. 1, 1930 to file brief, filed by taxpayer. Sep. 11, 1930 granted.

Oct. 1—Brief filed by General Counsel.

Oct. 21—Motion for extension to Dec. 1, 1930 to file brief, filed by taxpayer. October 22, 1930 granted.

Nov. 14—Brief filed by taxpayer.

1931

Oct. 7—Findings of fact and opinion rendered. Stephen J. McMahon, Div. 16. Judgment will be entered for the respondent.

Oct. 9—Decision entered. Stephen J. McMahon, Div. 16.

1932

Feb. 24—Stipulation to consolidate with dockets 28070, 34678, 34758, 34759, 35815 and 41089 for the purpose of review filed.

Feb. 24—Petition for review to U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.

Feb. 24—Proof of service filed.

Feb. 24—Praecipe with proof of service thereon filed.

95 * * (Caption 40426) * *

PETITION.

Filed August 24, 1928.

The above named petitioner hereby petitions for redetermination of the proposed deficiency in tax of $5,557.41 against her for the years 1924, 1925 and 1926 set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:B-11 WAW-60D) dated July 6, 1928, and as a basis for her proceeding alleges as follows:

I. The petitioner is a resident of the city of Milwaukee and a citizen of the state of Wisconsin residing at 411 Terrace Avenue, Milwaukee, Wisconsin, which is also her post office address.

96 II. The notice of deficiency a copy of which is attached and marked Exhibit "A" referred to above is dated July 6, 1928, and was on that date mailed to the petitioner.

III. The taxes in controversy are income and profits taxes claimed to be due from the petitioner for the calendar years 1924, 1925 and 1926 and the amount of such taxes in dispute is so much of said sum of $5,557.41 as results from the disallowance of depletion claimed as a deduction from distributable income to the petitioner of the net income of the Pfister, Smith & Mariner Trust for said years 1924, 1925 and 1926 referred to in the statement attached to said letter.

IV. The determination of tax set forth in said notice is based upon the following errors, namely:

(1) The Commissioner erred in disallowing the deduction for depletion claimed as a deduction from net income on the said trust returns for the years 1924, 1925 and 1926 and disallowing the deduction claimed by the petitioner in her returns for said years for her proportionate share of such depletion which should have been allowed on the returns of said trust in computing its net distributable income.

97 (2) The Commissioner erred in determining that the petitioner was liable for a deficiency tax for the years 1924, 1925 and 1926 in the sum of $5,557.41.

V. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) In the years 1924, 1925 and 1926 and prior thereto a certain iron ore mine located in the state of Michigan known as the Bristol Mine was held in trust by three trustees which said trust was known as the Pfister, Smith and Mariner Trust.

(b) The provisions of the trust conveyance by which said trust was created in so far as material to this proceeding were in substance as follows:

Said instrument was made, executed and delivered November 29, 1916, by which certain real estate in Michigan including said mine was conveyed to said three trustees in trust with full powers of sale, management and control and providing that after the payment of costs of administration and prior charges,

98 "All proceeds which shall come to the hands of the trustees from said property or from any use which may be made thereof, or from any source whatsoever hereunder as received by the trustees shall belong to and be the property of the beneficiaries hereunder, to be distributed and paid over to them in proportion to and in accordance with their respective interests as shown herein or as the same shall from time to time appear as hereinafter provided.

The beneficiaries of the trust hereby created and hereinbefore referred to and their respective interests hereunder at the time of the execution and delivery of this instrument are as follows:

Jesse Hoyt Smith—	1/4
Lucinda W. Mariner—	1/8
John W. Mariner—	1/8
Charles F. Pfister—	1/8
Louise F. Vogel—	1/8
Executors and trustees under the last will and testament of Jesse Hoyt, deceased—	1/4."

On the 4th day of January, 1921, Jesse Hoyt Smith, the owner of a 1/4 beneficial interest under said trust deed as above shown died and this petitioner as the chief beneficiary under his will succeeded to said 1/4th interest, since which time her beneficial interest under said trust and in the net proceeds resulting therefrom has been one-fourth.

(c) At the time of the execution of said trust conveyance, to-wit, November 29th, 1916, said Bristol Mine
99 was subject to a mining lease for a term of upwards of 15 years, exceeding the life of said mine on the basis of estimated ore reserves and the established rules for determining the life of said mine, so that during the term of said lease it could be assumed that all of the ore in said mine would be taken out and disposed of under said lease.

(d) The sole income and entire proceeds derived from the trust estate since the execution of said trust conveyance has been the royalties payable by the lessees under said lease to the owners of the fee, who after said trust conveyance were the trustees under said conveyance. The royalty reserved in said lease was 19 cents per ton.

(e) In or about the month of February, 1925, in connection with the audit of the accounts of the trustees for the years 1917, 1918, 1919, 1920 and 1921 the basis of valuation of said Bristol Mine for purposes of depletion was revised and redetermined by the mineral section and other representatives of the Income Tax Unit of the Internal Revenue De-
partment in conference with duly authorized representa-
100 tives of said trustees with the result that the basis of valuation of said mine for purposes of depletion was determined by the department as follows:

Ore reserve 3/1/13		3,556,732 Tons
Mined 3/1/13 to 11/29/16		
1913	379,170	
1914	172,606	
1915	378,830	
1916	462,800	1,392,806
Ore reserve 1129/16		2,163,926
Royalty rate—19 cents		
Gross expected royalty		$411,146.94
Less 3% expected expense		12,334.37
Net expected profit		398,811 57
Factor—6%—4%—9 years— .719198		
None removed from Nov. 29, 1916 to Jan. 1, 1917		

Value royalties as at Jan. 1, 1917			$286,824.48
Less — 1917	188,689 Tons	$25,010.35	
1918	245,280	32,511.37	
1919	58,138	7,706.07	
1920	368,488	48,842.35	
1921	13,555	1,796.69	115,866.83
	874,150		
Residual value—1,289,776 tons at .13255			170,957.65

(f) Said basis of valuation as so determined by the Income Tax Unit was proposed to the representatives of said trustees for acceptance in settlement of the controversy in relation to the matter then pending before said Income Tax Unit and was accepted and expressly agreed to on behalf of said trustees with the understanding that such settlement and determination was subject to the approval of the Commissioner.

101 (g) Thereafter on March 17, 1925, the trustees received a letter from the Commissioner (IT:PA:3 EPR:301) confirming said determination and basis of valuation for purposes of depletion and advising the trustees of the results of the audit by the Department of their books and accounts for income tax purposes for the years 1917 to 1921 inclusive based on said determination and upon the rates for depletion shown therein.

(h) After the receipt of said letters of March 17, 1925, confirming said settlement and determination of the basis of valuation of said mine for purposes of depletion, the trustees filed returns for the years 1922, 1923, 1924, 1925 and 1926 on the basis of said determination claiming a deduction of .13255 cents per ton for depletion in accordance therewith.

(i) The facts upon which said rate of depletion was based shown in the statement and computation above referred to, as petitioner is informed and believes, were substantially correct and entitled said trustees to the rate of depletion therein stated, to-wit, .13255 cents per ton.

102 (j) Since the execution of said trust conveyance it has been the practice of the trustees thereunder as authorized and required by the terms thereof to make distribution of the entire royalties received by them under said lease from time to time among the beneficiaries of said trust in accordance with their respective interests as before stated after paying or reserving costs of administration and prior charges without reserving from such distribution the portion

of such royalties corresponding to the proper allowance for depletion.

(k) Petitioner alleges upon information and belief that said sum of $5557.41 added to her taxable income for the years 1924, 1925 and 1926 as the result of the disallowance of depletion by said trust as aforesaid were not in law or in fact income but represented to that extent a return to the petitioner of her share of the corpus of said Bristol Mine covered by said mining lease and that such addition to the taxable income of petitioner was erroneous and without authority of law.

Wherefore petitioner prays that this Board hear this proceeding; that the deduction for depletion taken by said
103 trustees for the years 1924, 1925 and 1926 for said Bristol Mine be affirmed and allowed, and that the deductions in the returns of the petitioner for the years 1924, 1925 and 1926 on account of her interest in said Bristol mine be allowed, and that the tax liability of the petitioner be determined accordingly and in accordance with the facts hereinbefore stated.

CHARLES F. FAWSETT
Counsel for Petitioner.

P. O. Address:
425 East Water Street,
Milwaukee, Wisconsin.

104 State of Wisconsin, }
Milwaukee County. } ss.

IDA LANE SMITH being first duly sworn says she is the petitioner making the foregoing petition; that she has read said petition and is familiar with the contents thereof and that the same is true of her own knowledge except as to matters therein stated to be on information and belief and as to those matters she believes it to be true.

IDA LANE SMITH

Subscribed and sworn to before me this 20 day of August, A. D. 1928.

(Seal)

C. F. MIKKELSON
Notary Public, Milwaukee County, Wisconsin.

105

EXHIBIT "A."

TREASURY DEPARTMENT
Washington

IT:AR:B-11
WAW-60D

Jul 6, 1928.

Mrs. Ida Lane Smith,
411 Terrace Avenue,
Milwaukee, Wisconsin.

Madam:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1924, 1925 and 1926 discloses a deficiency of $5,557.41 as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. B. ALLEN,
Deputy Commissioner.

Inclosures:
Statement
Form A
Form 882.

106

Statement

IT:AR:B-11
WAW-60D

Jul 6, 1928

In re: Mrs. Ida Lane Smith
411 Terrace Avenue,
Milwaukee, Wisconsin.

Year	Deficiency in Tax
1924	$1,049.53
1925	1,701.43
1926	2,806.45
Total	$5,557.41

The report of the Internal Revenue Agent in Charge at Milwaukee, Wisconsin, covering an investigation of your tax liability for the years 1924 to 1926, inclusive, has been reviewed and approved by this office.

1924

Net income per return		$66,778.71
Add:		
1. Fiduciary income	$3,661.34	
2. Royalties	292.30	
3. Expense disallowed	126.80	4,080.44
Adjusted net income		$70,859.15

Computation of Tax

Total net income		$70,859.15
Less:		
Capital net gain		10,700.00
Income subject to surtax		$60,159.15
Less:		
Personal exemption	$ 1,000.00	
Dividends	34,799.20	35,799.20
Balanec subject to normal tax		$24,359.95
107 Tax at 2% on $4,000.00		$ 80.00
Tax at 4% on $4,000.00		160.00
Tax on 6% on $16,359.95		981.60
Surtax on $60,159.15		5,513.42
Tax at 12½% on capital gain of $10,700.00		1,337.50
Total tax		8,072.52
Less:		
Earned income credit	$ 20.00	
Tax paid at source	466.66	486.66
Net tax liability		$7,585.86
Original assessment	$6,503.36	
Additional assessment	32.97	6,536.33
Deficiency		$1,049.53

Explanation of Changes

1. You reported $2,872.26 as your distributive share of the net income of the Pfister, Smith and Mariner Trust,

whereas a review of the trust return discloses that the correct amount of $6,533.60. The increase results from the disallowance of depletion claimed as a deduction from distributable income on the trust return. Under the Revenue Acts of 1924 and 1926, the beneficiaries of an estate or trust are taxable on the amounts actually distributed to them without the benefit of any deduction for exhaustion of the corpus of the estate or trust. See Treasury Decision 3642, Cumulative Bulletin III-2, Page 184; Treasury Decision 3668, Cumulative Bulletin IV-1, Page 194; Income Tax Ruling 2218, Cumulative Bulletin IV-2, Page 61. This construction of the Revenue Acts has been sustained by various decisions of the United States Board of Tax Appeals. See appeal of Steffenson, Board of Tax Appeals, Volume 1, Page 979; appeal of McConnell, Board of Tax Appeals, Volume 3, Page 260.

2. The amount reported as royalties from the Gwinn Mine has been increased by $292.30, in accordance with the recommendation of the examining officer.

3. Legal expense in the amount of $126.80 incurred in connection with income tax matters has been disallowed as it constitutes a personal expense. The adjustment of this item has been explained in a previous report.

108 1925

Net income per return		$51,624.81
Add:		
1. Fiduciary income	$8,968.84	
2. Royalties	58.06	
3. Expense disallowed	1,250.00	10,276.70
Total		$61,901.51
Deduct:		
4. Capital gain decreased		400.00
Adjusted net income		61,501.51
Computation of Tax		
Total net income		61,501.51
Less:		
Capital net gain		3,670.00
Income subject to surtax		$57,831.51

Less:		
Personal exemption	$ 1,500.00	
Dividends	36,368.90	37,868.90
Balance subject to normal tax		$19,962.61
Normal tax at 1½% on $5,000.00		60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $11,962.61		598.13
Surtax on $57,831.51		4,074.73
Tax at 12½% on capital net gain of $3,670.00		458.75
Total tax		5,311.61
Less:		
Earned income credit	$ 13.12	
Tax paid at source	451.30	464.42
Net tax liability		4,847.19
Original assessment	$2,975.21	
Additional assessment	170.55	3,145.76
Deficiency		$ 1,701.43

109 Explanation of Changes

1. Income reported from the Pfister, Smith and Mariner Trust has been increased by $8,968.64 resulting from the disallowance of the deduction claimed for depletion on the trust return. For explanation of this adjustment see Item #1 under 1924 above.

2. The deduction of $58.06 for depletion applied against royalties received from the Gwinn Mine has been disallowed in accordance with the recommendation of the examining officer.

3. This item consists of legal fees in the amount of $850.00 which has been disallowed as it constituted a personal expense and a capital loss of $400.00 which has been transferred from ordinary income and applied as a deduction from capital gain. These adjustments were explained in a previous report.

4. See explanation under Item #3 above.

1926

Net income per return		$181,541.90
Add:		
1. Fiduciary income	$11,050.78	
2. Expense disallowed	175.00	11,225.78
Adjusted net income		192,767.68

Computation of Tax

Total net income		192,767.68
Less:		
Capital net gain		80,565.94
Income subject to surtax		112,201.74
Less:		
Personal exemption	$ 1,500.00	
Dividends	79,043.50	80,543.50
Balance subject to normal tax		31,658.24
Normal tax at 1½% on $4,000.00		$ 60.00
Normal tax at 3% on $4,000.00		120.00
110 Normal tax at 5% on $23,658.24		1,182.91
Surtax on $112,201.74		14,100.35
Tax at 12½% on capital net gain of $80,565.94		10,070.74
Total tax		25,534.00
Less:		
Earned income credit	$ 13.12	
Tax paid at source	480.04	493.16
Net tax liability		25,040.84
Tax previously assessed		22,234.39
Deficiency		2,806.45

Explanation of Changes

1. Income reported from the Pfister, Smith and Mariner Trust has been increased by $11,050.78 resulting from the disallowance of the deduction claimed for depletion on the trust return. For explanation of this adjustment see Item #1 for 1924 above.

2. The amount of $175.00 claimed as a deduction for legal fees has been disallowed as it constituted a personal expense.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

111 * * (Caption 40426) * *

ANSWER.

Filed Oct. 6, 1928.

The Commisioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, admits and denies as follows:

I. Admits the allegations contained in paragraph (I) of the petition.

II. Admits the allegations contained in paragraph (II) of the petition.

III. Admits the allegations contained in paragraph (III) of the petition.

IV. Denies the Commissioner erred in respect to the matters set forth in subdivisions (1) and (2) of paragraph (IV) of the petition.

V(a). Admits the allegations contained in subdivision (a) of paragraph (V) of the petition.

V(b). The respondent for the want of information or knowledge sufficient to form a belief as to the allegations contained in subdivision (b) of paragraph (V), denies the same.

112 V(c). Admits that at the time of the execution of said trust conveyance on November 29, 1916, said Bristol Mine was subject to a mining lease, but denies the remainder of the allegations contained in subdivision (c) of paragraph (V) of the petition.

V(d). Denies the allegations contained in subdivision (d) of paragraph (V) of the petition.

V(e). Denies the allegations contained in subdivision (e) of paragraph (V) of the petition.

V(f) Denies the allegations contained in subdivision (f) of paragraph (V) of the petition.

V(g). Denies the allegations contained in subdivision (g) of paragraph (V) of the petition.

V(h). Denies the allegations contained in subdivision (h) of paragraph (V) of the petition.

V(i). Denies the allegations contained in subdivision (i) of paragraph (V) of the petition.

V(j) Denies the allegations contained in subdivision (j) of paragraph (V) of the petition.

V(k). Denies the allegations contained in subdivision (k) of paragraph (V) of the petition.

Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

113 Wherefore, it is prayed that taxpayers' appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
BYRON M. COON,
Special Attorney, Bureau of Internal Revenue.

8 The Elmwood Company of Delaware,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 41089.

Appearances:

For Taxpayer: Charles F. Fawsett, Esq., R. S. Doyle, Esq.

For Comm'r.: P. A. Bayer, Esq.

DOCKET ENTRIES.

1928

Oct. 17—Petition received and filed. Taxpayer notified. (Fee paid.)

Oct. 18—Copy of petition served on General Counsel.

Dec. 1—Answer filed by General Counsel.

Dec. 4—Copy served on taxpayer. General Calendar.

1929

Aug. 30—Notice of appearance of R. S. Doyle as counsel for taxpayer filed. See 28070.

1930

Jan. 4—Hearing set February 26, 1930.

Feb. 19—Motion for continuance to April 28, 1930 filed by taxpayer. See 34678. Feb. 20, 1930 granted to April 28, 1930.

Apr. 23—Motion for continuance to May 21, 1930 filed by taxpayer. See 28070. April 25, 1930 granted May 21, 1930.

Apr. 28—Motion to place on Field Calendar filed by taxpayer. April 30. 1930, granted.

May 3—Motion to place on Reserve Calendar filed by taxpayer.

May 21—Hearing set July 8, 1930 at Milwaukee, Wisc.

Jul. 8—Hearing had before Mr. McMahon—called on merits—stipulation of facts received. Consolidated with 34678, 35815, 34758, 34759, 40426. Briefs due October 1, 1930.

Jul. 25—Transcript of hearing of July 8, 1930 filed.

Sep. 10—Motion for extension to Nov. 1, 1930 to file brief, filed by taxpayer. September 11, 1930 granted.

Oct. 1—Brief filed by General Counsel. See 28070.

Oct. 21—Motion for extension to Dec. 1, 1930 to file brief, filed by taxpayer.

Nov. 14—Brief filed by taxpayer.

1931

Oct. 7—Findings of fact and opinion rendered. Judgment will be entered for the Commissioner. Judge McMahon, Div. 16.

Oct. 9—Decision entered, Div. 16, Mr. McMahon.

1932

Feb. 24—Stipulation to consolidate with dockets 28070, 34678, 34758, 34759, 35815 and 40426 for petition for review, filed.

Feb. 24—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.

Feb. 24—Proof of service filed.

Feb. 24—Praecipe with proof of service thereon, filed.

114 * * (Caption 41089) * *

PETITION.

Filed Oct. 17, 1928.

The above named petitioner hereby petitions for a redetermination of the proposed deficiency in tax of $280.93 against the petitioner for the year 1926 as set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT: AR:A-5 NMP-60D) dated August 24, 1928, and as a basis of its proceeding alleges as follows:

I.

The above named petitioner is a corporation duly organized and existing under the laws of Delaware.

115

II.

The notice of deficiency a copy of which is attached marked Exhibit "A" referred to above is dated and was mailed to the petitioner August 24, 1928.

III.

The taxes in controversy are income and profits taxes claimed to be due from the petitioner for the calendar year 1926 and the amount of such taxes in dispute is the entire amount claimed as a deficiency in said notice, to-wit, the sum of $280.93.

IV.

The determination of said tax set forth in said notice is based upon the following errors, namely:

(1) The Commissioner erred in disallowing the deduction claimed in the return filed by Pfister, Smith and Mariner, Trustees for the year 1926 as depletion of an iron ore mine which was the subject of the trust referred to in said return with the result that one-eighth of said amount, being the beneficial interest of the petitioner under said trust was erroneously added to the taxable income of the petitioner for
116 the year 1926 as shown by said Exhibit "A" hereto annexed. Reference is made to the notice of the Commissioner to said Pfister, Smith and Mariner, Trustees, disallowing its said claim for deduction for the year 1926 on account of depletion of said iron ore mine.

(2) The Commissioner erred in determining that there is any deficiency in tax due from petitioner for the year 1926.

V.

The facts upon which petitioner relies as the basis of its proceeding are as follows:

(a) Since the year 1916 a certain iron ore mine located in the state of Michigan known as the Bristol Mine was held in trust by three trustees.

(b) The provisions of the trust conveyance by which said trust was created in so far as material to this proceeding were in substance as follows:

Said instrument was made, executed and delivered November 29, 1916, by which certain real estate in Michigan including said mine was conveyed to the trustees above re-

ferred to or their predecessors in trust with full powers
117 of sale, management and control and providing that after the payment of the costs of administration and prior charges:

"All proceeds which shall come to the hands of the trustees from said property or from any use which may be made thereof, or from any source whatsoever hereunder as received by the trustees shall belong to and be the property of the beneficiaries hereunder, to be distributed and paid over to them in proportion to and in accordance with their respective interests as shown herein or as the same shall from time to time appear as hereinafter provided.

The beneficiaries of the trust hereby created and hereinbefore referred to and their respective interests hereunder at the time of the execution and delivery of this instrument are as follows:

Jesse Hoyt Smith—	1/4
Lucinda W. Mariner—	1/8
John W. Mariner—	1/8
Charles F. Pfister—	1/8
Louise F. Vogel—	1/8
Executors and trustees under the last will and testament of Jesse Hoyt, deceased—	1/4."

The petitioner has succeeded to and was in the year 1926 and is now the owner of the 1/8th interest of Louise F. Vogel referred to above.

(c) At the time of the execution of said trust conveyance, to-wit, November 29th, 1916, said Bristol Mine
118 was subject to a mining lease for a term of upwards of 15 years, exceeding the life of said mine on the basis of estimated ore reserves and the established rules for determining the life of said mine, so that during the term of said lease it could be assumed that all of the ore in said mine would be taken out and disposed of under said lease.

(d) The sole income and entire proceeds derived from the trust conveyance since the execution of said trust conveyance has been the royalties payable by the lessees under said lease to the owners of the fee, who after said trust conveyance were the trustees under said conveyance. The royalty rate reserved in said lease was 19 cents per ton.

(e) In or about the month of February, 1925, in connection with the audit of the accounts of the trustees for the years 1917, 1918, 1919, 1920 and 1921 the basis of valuation of said Bristol Mine for purposes of depletion was revised and redetermined by the mineral section and other represen-

tatives of the Income Tax Unit of the Internal Revenue Department in conference with duly authorized representa-
119 tives of said trustees with the result that the basis of valuation of said mine for purposes of depletion was determined by the department as follows:

Ore reserve 3/1/13			3,556,732 Tons
Mined 3/1/13 to 11/29/16			
1913		379,170	
1914		172,006	
1915		378,830	
1916		462,800	1,392,806
Ore reserve 11/29/16			2,163,926
Royalty rate—19 cents			
Gross expected royalty			$411,146.94
Less 3% expected expense			12,334.37
Net expected profit			398,811.57
Factor—6%—4%—9 years— .719198			
None removed from Nov. 29, 1916 to Jan. 1, 1917			
Value of royalties as at Jan. 1, 1917			286,824.48
Less — 1917	188,689 Tons	$25,010.35	
1918	245,280	32,511.37	
1919	58,138	7,706.07	
1920	368,488	48,842.35	
1921	13,555	1,796.69	115,866.83
	874,150		
Residual value—1,289,776 tons at .13255			170,957.65

(f) Said basis of valuation as so determined by the Income Tax Unit was proposed to the representatives of said trustees for acceptance in settlement of the controversy in relation to the matter then pending before said Income Tax Unit and was accepted and expressly agreed to on behalf of said trustees with the understanding that such settlement and determination was subject to the approval of the Commissioner.

120 (g) Thereafter on March 17, 1925, the trustees received a letter from the Commissioner (IT:PA:3 EPR:301) confirming said determination and basis of valuation for purposes of depletion and advising the trustees of the results of the audit by the Department of their books and accounts for income tax purposes for the years 1917 to 1921 inclusive based on said determination and upon the rates for depletion shown therein.

(h) Since the receipt of said letter of March 17, 1925, confirming said settlement and determination of the basis of valuation of said mine for purposes of depletion, the trustees have filed returns based thereon including their return for the year 1926 in which a claim for deduction on account of depletion was made as shown therein.

(i) The facts upon which said rate of depletion was based shown in the statement and computation above referred to, as petitioner is informed and believes, were substantially correct and entitled said trustees to the rate of depletion therein stated, to-wit, .13255 cents per ton.

121 (j) Since the execution of said trust conveyance it has been the practice of the trustees thereunder as authorized and required by the terms thereof to make distribution of the entire royalties received by them under said lease from time to time among the beneficiaries of said trust in accordance with their respective interests as before stated after paying or reserving costs of administration and prior charges without reserving from such distribution the portion of such royalties corresponding to the proper allowance of depletion.

(k) Petitioner alleges upon information and belief that the amount added to its taxable income for the year 1926 by reason of the disallowance to said trustees of said deduction for depletion was not in law and in fact income but represented a return to the petitioner by the trustees under said trust conveyance pro tanto of its share of the corpus of the trust estate held by said trustees and that such addition to the taxable income of petitioner was erroneous.

Wherefore petitioner prays that this Board hear this proceeding; that the deduction for depletion taken by said
122 trustees for the year 1926 be affirmed and allowed and that the tax liability of the petitioner for said year 1926 be redetermined accordingly, and that it be determined that the petitioner is not liable for any deficiency in tax for said year 1926.

CHARLES F. FAWSETT
Counsel for Petitioner.

P. O. Address:
425 East Water Street,
Milwaukee, Wisconsin.

State of Wisconsin, } ss.
Milwaukee County. }

CHARLES P. VOGEL being first duly sworn, deposes and says that he is one of the officers to-wit, the vice-president of Elmwood Company of Delaware, the petitioner making the foregoing petition; that he makes this verification as such officer for said petitioner and is duly authorized so to do; that he has read said petition and is familiar with the contents thereof and that the same is true of his own knowledge except as to matters therein stated on information and belief and as to those matters he believes them to be true.

CHARLES P. VOGEL

Subscribed and sworn to before me this 15th day of October, A. D. 1928.

(Seal)

FRED FELBER
Notary Public, Milwaukee County, Wisconsin.

My Commission expires Sept. 19th, 1922.

123

EXHIBIT "A."

TREASURY DEPARTMENT

Washington

Aug. 24, 1928.

Elmwood Co. of Delaware,
C/o First Trust & Savings Bank,
Monroe & Dearborn Sts.,
Chicago, Illinois.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the year 1926 discloses a deficiency of $280.93, as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the

Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:-P-7.

Respectfully,
D. H. BLAIR,
Commissioner.
By (Signed) C. B. ALLEN,
Deputy Commissioner.

Enclosures
Statements
Form 866
" 882

124 Statement.

IT:AR:A-5
NMP—60D

In re: Elmwood Company of Delaware,
C/o First Trust & Savings
Bank, Monroe & Dearborn
Streets, Chicago, Illinois.

Year	Deficiency in Tax
1926	$280.93

Net income reported on return		$24,281.85
Add:		
1. Increase in distributive share from Pfister, Smith & Mariner Trust		5,525.39
Net income as adjusted		29,807.24

Explanation of Change.

1. As a result of the changes in the Pfister, Smith & Mariner Trust income the proportionate share of your corporation in the distributive income has been determined to be

Amount reported	$8,330.95
	2,805.56
Additional Inc. (Article 541, Regulations 69)	5,525.39

Computation of Tax.

Net income as adjusted		29,807.24
Income tax at 13½%		4,023.98
Tax assessed, Account #402800	$3,008.05	
Tax assessed, List, January 21, 1928, Page 1, Line 0, #3	735.00	3,743.05
Deficiency in Tax		280.93

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

125

October 31, 1927.

In re Elmwood Company of Delaware,
Chicago, Illinois.

Page 12

Computation of tax—1926 rates.

Schedule 3 Income Tax	Year ended 12/31/26
Net income taxable year Schedule 1	$27,726.29
Balance taxable at 13½%	27,726.29
Income tax	3,743.05
Total tax	3,743.05
Previously assessed	3,008.05
Additional to be assessed	735.00

126 * * (Caption 41089) * *

28.

ANSWER.

Filed Dec. 1, 1928.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, admits and denies as follows:

I. Admits the allegations contained in paragraph (1) of the petition.

II. Admits the allegations contained in paragraph (II) of the petition.

III. Admits the allegations contained in paragraph (III) of the petition.

IV. Denies the Commissioner erred in respect to the matters set forth in subdivision (1) and (2) of paragraph (IV) of the petition.

V(a) Admits the allegations contained in subdivision (a) of paragraph (V) of the petition.

V(b) The Respondent for the want of information and knowledge sufficient to form a belief as to the allegations contained in subdivision (b) of paragraph (V), denies the same.

127 V(c) Admits that at the time of the execution of said trust conveyance on November 29, 1916, said Bristol

Mine was subject to a mining lease, but denies the remainder of the allegations contained in subdivision (c) of paragraph (V) of the petition.

V(d) Denies the allegations contained in subdivision (d) of paragraph (V) of the petition.

V(e) Denies the allegations contained in subdivision (e) of paragraph (V) of the petition.

V(f) Denies the allegations contained in subdivision (f) of paragraph (V) of the petition.

V(g) Denies the allegations contained in subdivision (g) of paragraph (V) of the petition.

V(h) Denies the allegations contained in subdivision (h) of paragraph (V) of the petition.

V(i) Denies the allegations contained in subdivision (i) of paragraph (V) of the petition.

V(j) Denies the allegations contained in subdivision (j) of paragraph (V) of the petition.

V(k) Denies the allegations contained in subdivision (k) of paragraph (V) of the petition.

Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

(Signed) C. M. CHAREST,
C. M. Charest,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
BYRON M. COON,
Special Attorney.

152 * * (Captions, Nos. 28070; 34678; 34758; 34759; 35815, 40426 and 41089.) * *

STIPULATION.

Filed at Hearing, July 8, 1930.

For the purposes of the hearing, trial and determination of the above cases now pending before the United States Board of Tax Appeals,

It Is Hereby Stipulated by and between the petitioners in said cases respectively and the Commissioner of Internal Revenue, respondent, as follows:

That the controverted issues or questions involved in all

of said cases are the same and depend for their determination on the same facts, and that all of said cases for the purposes of the hearing and determination of the questions involved may be consolidated and tried together on the following stipulation of facts, to-wit:

In addition to such facts alleged in the petitions in said cases as are submitted in the answers of the respondent,

It Is Stipulated as follows:

(1) The Pfister Land Company, the grantor, a Wisconsin corporation, pursuant to authority of the stockholders and directors thereof, executed a trust conveyance on the 29th day of November, 1916, a true copy of which is annexed hereto and marked "Exhibit A."

153 (2) That at the time of the execution of said trust conveyance, to-wit, November 29, 1916, the Bristol Mine referred to therein was subject to a mining lease for a term of upwards of fourteen years.

(3) The royalty rate reserved in said lease was 19 cents per ton. The sole question presented by these proceedings is whether the income under these leases during the years 1922 to 1926, both inclusive, as distributed to the petitioner beneficiaries under the trust, may be reduced by an amount equal to the rate agreed upon in Paragraph 8 below for depletion purposes by the petitioners and the respondent, if depletion as a matter of law is an allowable deduction to the beneficiary petitioners.

(4) Since the execution of said trust conveyance it has been the practice of the trustees thereunder as authorized and required by the terms thereof to make distribution of the entire royalties received by them under said lease from time to time among the beneficiaries of said trust in accordance with their respective interests as shown therein below, after paying or reserving costs of administration and prior charges, but without otherwise reserving from such distribution any portion of such royalties as a depletion

154 reserve.

(5) The petitioners waive all other issues or questions raised in their respective petitions in the above-entitled cases except the question of their right to deductions as claimed by them from taxable income on account of depletion.

(6) Ida Lane Smith, the petitioner in Docket Nos. 34758 and 40426, is the successor in right, title and interest under the trust deed to Jesse Hoyt Smith, a beneficiary under the trust deed of a one-quarter interest.

Elmwood Company, the petitioner in Docket No. 41089 and Docket No. 35815, is the successor in right, title and interest to Louise F. Vogel, a beneficiary under the trust deed of a one-eighth interest.

John W. Mariner, the petitioner in Docket No. 34759, in addition to the interest which he originally had under the trust deed, has succeeded to the right, title and interest of Lucinda W. Mariner of one-eighth, and the distributions under the trust deed have been made accordingly since such succession, which was prior to the year 1922.

(7) If as a matter of law the petitioners are entitled to any deduction from taxable income received during the years in question under the provisions of this trust for depletion of the ore reserves in said mine, the basis of such determination is correctly stated as follows:

Ore reserve, March 1, 1913	3,556,732	tons
Mined March 1, 1913, to November 29, 1916	1,392,806	"
Ore reserve November 29, 1916	2,163,926	"
Royalty rate $0.19 per ton		
Gross expected royalty	$411,145.94	
Less 3% expected expense	12,334.37	
Net expected profit	398,811.57	
Rate 6% and 4%, life 9 years, Factor	.719198	
Present Worth as of November 29, 1916	286,824.48	
Depletion unit per ton	.13255	

(8) In the following schedule is shown the tons mixed from the said Bristol mine during the years in controversy, the royalties received by the trustees and the depletion sustained resulting from the application of the rate of $.13255 per ton applied to said production and income.

Depletion Schedule.

Year	Tons Mined	Royalty Earned	Depletion Sustained
1922	115,996	$ 23,528.70	$15,375.27
1923	453,803	130,898.66	60,151.59
1924	110,489	26,031.39	14,645.32
1925	270,649	50,837.10	35,874.52
1926	378,878	68,890.53	50,220.28

(9) The proportional interest of the petitioner beneficiaries in the trust income was as follows:

Beneficiary	Year 1922	1923	1924	1925	1926
Ida Lane Smith	¼	¼	¼	¼	¼
John W. Mariner	¼	¼	¼	¼	¼
Charles F. Pfister	⅛	⅛	⅛	⅛	⅛
Elmwood Company of Delaware	⅛	⅛	⅛	⅛	⅛

156 (10) The parties hereto reserve the right to offer additional evidence at the hearing not inconsistent with the facts here stipulated.

CHARLES F. FAWSETT,
RICHARD S. DOYLE,
per C. F. F.
Attorneys for the Petitioners.
C. M. CHAREST,
by P. A. B.
General Counsel, Bureau of Internal Revenue, Attorney for the Respondent.

157 EXHIBIT A.

This Indenture, Made this 29th day of November, A. D. 1916, by and between Pfister Land Company, a corporation of the State of Wisconsin, with its principal office and place of business at the City of Milwaukee, in said State, party of the first part, and Charles F. Pfister, Jesse Hoyt Smith and John W. Mariner of Milwaukee, Wisconsin, parties of the second part, Witnesseth:

That the said party of the first part for and in consideration of the sum of One Dollar ($1.00), and other valuable consideration, to it in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, has given, granted, bargained, sold, remised, released, aliened, conveyed and confirmed and by these presents does give, grant, bargain, sell, remise, release, alien, convey and confirm unto the said parties of the second part, and to their successors under the trust hereinafter created, the following described property, to-wit:

The following described land in the County of Dickinson, and State of Michigan:

The East Half of the Southwest Quarter (E. ½ of S. W. ¼) and the Northwest Quarter of the Southwest Quarter (N. W. ¼ of S. W. ¼) of Section Six (6), Township Thirty-nine (39)

North, of Range Twenty-eight (28) West; the South Half of the Southeast Quarter (S. ½ of S. E. ¼) of Section Fourteen (14), Township Thirty-nine (39) North, of Range Twenty-nine (29) West, except a strip of land thirty-three (33) feet wide off entire South line deeded April 12, 1913, to Township of Norway for highway purposes; the Northwest Quarter of the Northwest Quarter (N. W. ¼ of N. W. ¼) of Section Twenty-four (24), Township Thirty-nine (39) North, of Range Twenty-nine (29) West; the Southwest Quarter of the Southeast Quarter (S. W. ¼ of S. E. ¼) and the South Half of the Southwest Quarter (S. ½ of S. W. ¼) of Section Thirty-three (33), Township Forty-two (42) North, of Range Twenty-nine (29) West; the South Half of the Southwest Quarter (S. ½ of S. W. ¼) of Section Thirty-six (36), Township Forty-two (42) North, Range Twenty-nine (29) West; the Southwest Quarter (S. W. ¼), the West Half of the Southeast Quarter (W. ½ of S. E. ¼) and the Northeast Quarter of the Southeast Quarter (N. E. ¼ of S. E. ¼) of Section Four (4), Township Thirty-nine (39) North, of Range Thirty (30) West; the Northeast Quarter of the Northeast Quarter (N. E. ¼ of 158 N. E. ¼) of Section Twenty-eight (28), Township Forty (40) North, Range Thirty (30) West, subject to right-of-way granted to Chicago & Northwestern Ry. Co. December 8, 1882, right-of-way granted to Escanaba, Iron Mountain & Western Ry. Co. June 11, 1891, and right-of-way granted to Chicago, Milwaukee & St. Paul Ry. Co. January 5, 1901; the Southeast Quarter of the Northeast Quarter (S. E. ¼ of N. E. ¼) of Section Twenty-eight (28), Township Forty (40) North, of Range Thirty (30) West, subject to right-of-way granted to Chicago & Northwestern Ry. Co. December 8, 1882, and right-of-way granted to Chicago, Milwaukee & St. Paul Ry. Co. January 5, 1901; the West Half of the Southwest Quarter (W. ½ of S. W. ¼) and the South Half of the Southeast Quarter (S. ½ of S. E. ¼) of Section Twenty-five (25), Township Forty-two (42) North, of Range Thirty (30) West, and the South Half of the Southeast Quarter (S. ½ of S. E. ¼) of Section Thirty-five, Township Forty-two (42) North, of Range Thirty (30) West, subject to right-of-way granted to Milwaukee Northern Ry. Co. September 21, 1888.

The following described real estate in the County of Iron, and State of Michigan:

The Southwest Quarter of the Northwest Quarter (S. W. ¼ of N. W. ¼) of Section Five (5), Township Forty-two (42) North, of Range Thirty-two (32) West; the South Half of

the Northeast Quarter (S. ½ of N. E. ¼) and the Northwest Quarter of the Southwest Quarter (N. W. ¼ of S. W. ¼) of Section Six (6), Township Forty-two (42) North, of Range Thirty-two (32) West, subject to right-of-way granted to Chicago & Northwestern Railway Co. dated April 25, 1887, and to an easement granted to Peninsular Power Co. for an electric transmission line dated December 6, 1915; the Northwest Quarter of the Northwest Quarter (N. W. ¼ of N. W. ¼) and the Southwest Quarter of the Southwest Quarter (S. W. ¼ of S. W. ¼) of Section Eight (8), Township Forty-two (42) North, of Range Thirty-two (32) West; the Southwest Quarter of the Southwest Quarter (S. W. ¼ of S. W. ¼) of Section Three (3), Township Forty-three (43) North, of Range Thirty-one (31) West; the North Half of the Southeast Quarter (N. ½ of S. E. ¼) and the Southwest Quarter of the Southeast Quarter (S. W. ¼ of S. E. ¼) of Section Four (4) Township Forty-three (43) North, of Range Thirty-one (31) West; the Southeast Quarter of the Northeast Quarter (S. E. ¼ of N. E. ¼) of Section Twenty (20), Township Forty-three (43) North, of Range Thirty-two (32) West; the Southeast Quarter of the Northwest Quarter (S. E. ¼ of N. W. ¼) of Section Twenty-one (21), Township Forty-three (43) North, of Range Thirty-two (32) West, subject to right-of-way one hundred (100) feet wide granted to Paint River Ry. Co. July 18, 1890; the Southeast Quarter of the Southwest Quarter (S. E. ¼ of S. W. ¼) of Section Twenty-four (24), Township Forty-three (43) North, of Range Thirty-three (33) West, subject to an iron mining lease (with S. W. ¼ of S. W. ¼ of Sec. 24-43-33, and N. ½ of N. W. ¼ of Sec. 25-43-33) to The Fortune Lake Mining Co., expiring July 31, 1965, subject to a right-of-way one hundred (100) feet wide granted to Chicago, Milwaukee & St. Paul Ry. Co. dated January 9, 159 1915, and subject to an easement for an electrical transmission line granted to Peninsular Power Co. November 23, 1916; the North Half of the Northwest Quarter (N. ½ of N. W. ¼) of Section Twenty-five (25), Township Forty-three (43) North, of Range Thirty-three (33) West, subject to an iron mining lease (with S. ½ of S. W. ¼ of Sec. 24-43-33) to The Fortune Lake Mining Co., expiring July 31, 1965, and subject to a right-of-way one hundred (100) feet wide granted to Chicago, Milwaukee & St. Paul Ry. Co. January 9, 1915; the Northwest Quarter of the Northeast Quarter (N. W. ¼ of N. E. ¼) of Section Twenty-five (25), Township Forty-three (43) North, of Range Thirty-three (33) West; the Northeast Quarter of the Southeast Quarter (N. E. ¼ of S. E.

¼) of Section Nineteen (19), Township Forty-three (43) North, of Range Thirty-two (32) West, in the City of Crystal Falls, subject to a railway right-of-way one hundred (100) feet wide, date of granting of which is unknown, subject to a right-of-way one hundred (100) feet wide granted to Chicago, Milwaukee & St. Paul Ry. Co. dated June 10, 1901, subject to right-of-way one hundred (100) feet wide granted to Chicago, Milwaukee & St. Paul Ry. Co. dated January 9, 1915, subject to an iron mining lease (with S. E. ¼ of S. E. ¼ of same section) to The Bristol Mining Company, expiring February 13, 1930, subject to a lease of the surface to The Bristol Mining Company expiring February 13, 1930, and subject to an easement for an electric transmission line granted to Peninsular Power Company dated April 7, 1916; the Northwest Quarter of the Southwest Quarter (N. W. ¼ of S. W. ¼) of Section Twenty-one (21), Township Forty-three (43) North, of Range Thirty-two (32) West, and Lot Three (3) of said Section Twenty-one (21), Township Forty-three (43) North, of Range Thirty-two (32) West, in said City of Crystal Falls, both of above descriptions being subject to an iron mining lease to James Corrigan, Stevenson Burke and Price McKinney expiring December 31, 1917; and the Southwest Quarter of the Southeast Quarter (S. W. ¼ of S. E. ¼) of Section Twenty-nine (29), Township Forty-three (43) North, of Range Thirty-two (32) West, subject to right-of-way granted to Chicago, Milwaukee & St. Paul Ry. Co. dated June 7, 1907.

All right, title and interest in and to the following described real estate in the County of Dickinson, and State of Michigan, such title and interest believed to be only the minerals contained in the said real estate and the right to enter, mine and remove the same:

The Northwest Quarter of the Northwest Quarter (N. W. ¼ of N. E. ¼) of Section Eighteen (18), Township Thirty-nine (39) North, of Range Twenty-eight (28) West; a strip of land thirty-three (33) feet wide deeded to Township of Norway for highway purposes April 12, 1913, along the entire center line of the South Half of the Southeast Quarter (S. ½ of S. E. ¼) of Section Fourteen (14) Township Thirty-nine (39) North, of Range Twenty-nine (29) West; the South Half of the Southwest Quarter (S. ½ of S. W. ¼) of Section Six (6), Township Forty (40) North, of Range Thirty (30) West; the North Half of the Northeast Quarter (N. ½ of N. E. ¼) and the Southeast Quarter of the Northeast Quarter (S. E. ¼ of N. E. ¼) of Section Eighteen
160

(18), Township Forty (40) North, of Range Thirty (30) West; Lot one (1) of Section Twenty-eight (28), Township Forty (40) North, of Range Thirty (30) West subject to right-of-way granted to Chicago & Northwestern Ry. Co. dated December 8, 1882, and right-of-way granted to Chicago, Milwaukee & St. Paul Railway Co. dated January 5, 1901; and the North Half of the Southwest Quarter (N. ½ of S. W. ¼), the Southeast Quarter of the Northwest Quarter (S. E. ¼ of N. W. ¼) and Lots One (1) and Two (2) of Section Thirty-six (36), Township Forty (40) North, of Range Thirty (30) West.

All right, title and interest in and to the following described real estate in the County of Iron, and State of Michigan, such title and interest believed to be only minerals contained in the said real estate and the right to enter, mine and remove the same:

The Southeast Quarter of the Southeast Quarter (S. E. ¼ of S. E. ¼) of Section Four (4), Township Forty-three (43) North, of Range Thirty-one (31) West; the Southwest Quarter of the Southwest Quarter (S. W. ¼ of S. W. ¼) of Section Twenty-four (24), Township Forty-three (43) North, of Range Thirty-three (33) West, subject to an iron mining lease (with S. E. ¼ of S. W. ¼ of Sec. 24-43-33 and N. ½ of N. W. ¼ of Sec. 25-43-33) expiring July 31, 1965, granted to The Fortune Lake Mining Co., and the East Half of the Northeast Quarter (E. ½ of N. E. ¼) and the Southwest Quarter of the Northeast Quarter (S. W. ¼ of N. E. ¼) of Section Twenty-five (25), Township Forty-three (43) North, of Range Thirty-three (33) West; the Southeast Quarter of the Southeast Quarter (S. E. ¼ of S. E. ¼) of Section Nineteen (19), Township Forty-three (43) North, of Range Thirty-two (32) West, in the City of Crystal Falls, subject to an iron mining lease (with N. E. ¼ of S. E. ¼) of same section) to The Bristol Mining Company expiring February 13, 1930; the Northeast Quarter of the Northeast Quarter (N. E. ¼ of N. E. ¼) of Section Twenty-nine (29), Township Forty-three (43) North, of Range Thirty-two (32) West, in said City of Crystal Falls, subject to a railway right-of-way, date unknown; the Northwest Quarter of the Northeast Quarter (N. W. ¼ of N. E. ¼) of Section Twenty-nine (29), Township Forty-three (43) North, of Range Thirty-two (32) West, in said City of Crystal Falls, subject to a railway right-of-way, date unknown; the Southwest Quarter of the Northeast Quarter (S. W. ¼ of N. E. ¼) of Section Twenty-nine (29), Township Forty-three (43) North, of Range Thirty-two (32)

West, in said City of Crystal Falls, subject to a railway right-of-way, date unknown; the Southeast Quarter of the Northeast Quarter (S. E. ¼ of N. E. ¼) of Section Twenty-nine (29), Township Forty-three (43) North, of Range Thirty-two (32) West, in said City of Crystal Falls, subject to a railway right-of-way, date unknown, and to an iron mining option granted to J. J. Gaffney dated May 9, 1916, and expiring sixty days from November 1, 1916; the North-
161 west Quarter of the Southeast Quarter (N. W. ¼ of S. E. ¼) of Section Twenty-nine (29), Township Forty-three (43) North, of Range Thirty-two (32) West, in said City of Crystal Falls, subject to a railway right-of-way, date unknown; and the Northeast Quarter of the Northwest Quarter (N. E. ¼ of N. W. ¼) and the Northwest Quarter of the Northwest Quarter (N. W. ¼ of N. W. ¼) of Section Twenty-nine (29), Township Forty-three (43) North, of Range Thirty-two (32) West, in said City of Crystal Falls.

Together with all and singular the appurtenances thereunto belonging or in anywise appertaining, and all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part either in law or equity, either in possession or expectancy.

In Trust, Nevertheless, for the uses and purposes and with and subject to the powers, directions and limitations hereinafter expressed, to-wit:

1. To have and to hold the said property and the appurtenances appertaining thereto subject to the powers, disposition and directions hereinafter contained unto the said parties of the second part, their successors or assigns, In Trust during the lives of Jesse Hoyt Smith and John W. Mariner, and of each of them, and for twenty-one (21) years thereafter.

2. The said parties of the second part, hereafter called the "Trustees," shall have and they are hereby granted full power to sell, convey, mortgage, lease, barter, exchange or otherwise dispose of said property, or any part thereof, including the power and authority to extend or renew existing leases, at such prices and upon such terms and conditions as they or a majority of them may deem best, and full power and authority to manage and control said property or such parts as may remain in their hands from time to time during the continuance of the trust in all respects
162 as the owners thereof subject only to their accountability hereunder as Trustees and the performance of their duties as such Trustees as herein expressed.

In case at any time during the term of the trust the revenues or proceeds from the trust estate in the hands of the Trustees, or which may reasonably be expected to accrue or come to their hands within the time as the same may be needed, shall not be sufficient to protect the property in their hands against any charges for assessments, taxes or any other charge whatsoever which if not paid or satisfied may result in the loss of the trust estate or any part thereof, the Trustees are authorized to make or levy such assessment upon the beneficiaries hereunder as may be required to pay or satisfy such charges and to fully protect the property in their hands from the liability to such loss, such assessment to be made ratably upon the beneficiaries in proportion to their respective interests.

Whenever any such assessment shall be made by the Trustees notice thereof shall be given to the beneficiaries by notice in writing properly addressed and duly mailed to each of them at his or her last known post office address. In case no response shall be received to such notice within thirty (30) days after the same shall have been mailed, a second such notice shall be mailed in like manner and in case any beneficiary shall not within thirty (30) days after such second notice shall have been mailed pay to the Trustees the amount so assessed, the interest of such beneficiary so 163 failing to pay his or her assessment may be sold by the Trustees at public auction to satisfy such assessment together with all costs which may be necessarily or properly incurred in making such sale. Such sale may be made upon such notice as shall be required by the laws of the State of Wisconsin in making sales of personal property under executions issued upon judgments except that in all cases besides the notice required in sales upon execution, notice in writing of the time and place of such sale shall be mailed to the beneficiary whose interest is to be sold not less than twenty (20) days before the time of such sale.

Upon any such sale being made any balance which may remain in the hands of the Trustees after retaining the amount of the assessment and all costs and expenses necessarily or properly incurred in connection with the sale shall be remitted to the beneficiary in the manner in which other remittances may be made as hereinafter provided.

3. The Trustees shall exercise their best judgment in the disposition, management and control of said property with the view to making sales at fair prices from time to time of such portions thereof as in their judgment should and may be

sold, and to provide for the proper exploration or development of such portions as in their judgment should be explored or developed for the discovery or recovery of iron ore or other mineral deposits which may be contained therein, and may conduct or authorize to be conducted such mining operations as in their judgment may be necessary or most advantageous for the interest of the beneficiaries here-
164 under in the recovery and marketing of any iron ore or other mineral deposits which may be discovered or contained in or upon the real estate hereinbefore described, and in the making of any leases which may be made therefor the term of such lease need not be limited to the term of the trust herein created but may be for such terms and conditions as the trustees may deem best. They may also make any expenditures out of proceeds in their hands for the improvement or development of said property in any manner whatsoever which in their judgment may be necessary or desirable to facilitate sales, or which they may deem to be otherwise to the advantage of the trust estate and for the interests of the beneficiaries hereunder.

They shall pay all taxes and lawful charges against or upon said property while the same shall remain in their hands during the term of the trust, and collect all rents, issues and profits including all royalties accrued or which may accrue under the mining leases under which portions of said real estate are now held, or under any leases which may hereafter be made of any portions of said real estate, including also the amounts due or which may become due for any sales or under any contracts for the sale of said property or any portion thereof.

4. Out of the proceeds which shall come to their hands, the Trustees shall be entitled to re-imbursement for all expenditures actually and properly made or incurred by them including office rent, clerk hire, counsel fees and all other expenses which may be lawfully and properly incurred
165 pursuant to the authority herein given. They are also authorized and directed to pay out of such proceeds all accounts payable by the party of the first part which shall not have been paid at the time of the execution and delivery hereof; also all charges, liabilities, costs or expenses incurred or which may hereafter be incurred by the party of the first part in any and all suits, actions or proceedings in court or otherwise heretofore begun or pending and to which the said party of the first part is a party, and generally to assume and pay any and all liabilities whatsoever of the party

of the first part existing at the time of the execution and delivery hereof or which may hereafter be incurred by it in any matter or proceeding now pending or begun prior to the execution and delivery hereof.

They shall also be entitled to retain a reasonable compensation for their services, and shall be entitled to retain from time to time such further sums as may be necessary or proper in their judgment to make provision for any expenditures or obligations about to be incurred in the proper performance of their duties hereunder, or for the protection of the property in their hands against all charges which may accrue in the future and for which it may be considered by them that the current revenues which the property may be yielding at the time may not be sufficient.

Except as above authorized to be expended, paid out or retained, all proceeds which shall come to the hands of the Trustees from said property or from any use which may be made thereof, or from any source whatsoever hereunder
166 as received by the Trustees shall belong to and be the property of the beneficiaries hereunder to be distributed and paid over to them in proportion to and in accordance with their respective interests as shown herein, or as the same shall from time to time appear as hereinafter provided.

5. The beneficiaries of the trust hereby created and hereinbefore referred to and their respective interests hereunder at the time of the execution and delivery of this instrument are as follows:

Jesse Hoyt Smith	One-Quarter
Lucinda W. Mariner	One-Eighth
John W. Mariner	One-Eighth
Charles F. Pfister	One-Eighth
Louise F. Vogel	One-Eighth
Executors of and Trustees under the Last Will and Testament of Jesse Hoyt, deceased	One-Quarter

6. For the protection of the Trustees and to facilitate the administration of the trust, to be entitled to receive prompt remittance of their distributive shares of the proceeds of the trust which shall from time to time become distributable hereunder, the beneficiaries and each of them shall keep on file with the Trustees their respective names and post office addresses, and in distributing the proceeds hereunder such distribution may be made by mail by sending to each of the beneficiaries, the amount of his or her distributive share properly addressed and mailed to his or her last known post office

address. In case of a change in the interest of any bene-
167 ficiary, or any division of such interest, or in case of the acquisition of any interest hereunder by any other person, notice thereof in writing shall be given to the Trustees with satisfactory evidence of such division, change or acquisition, with the name, residence and post office address of the person or persons thereafter entitled and showing the interest of such person or persons. In any case in which the Trustees shall not be properly advised of the interest of any beneficiary or of his or her post office address, the share or shares of such person or persons shall be kept by the Trustees for the benefit of the person or persons who may prove to be entitled thereto and until in their judgment distribution thereof may be properly and safely made, without liability on the part of the Trustees for failure to make an earlier distribution or payment thereof to the persons entitled. In all cases in making distributions of any proceeds in their hands and in all other respects in the administration of the trust hereunder, the Trustees shall be entitled to consider, treat and deal with the persons last known to them as the beneficiaries hereunder as in fact the beneficiaries and their last known post office addresses as their proper post office addresses and shall not be liable or responsible for any error or mistake which may be made by them in that regard unless the person or persons complaining thereof shall have fully complied with the requirements hereof in keeping the Trustees properly advised both as to their interest and post office address as hereinbefore provided. Nothing herein contained shall prevent the Trustees in their discretion and as they may elect from paying over the distributive share of any
168 beneficiary hereunder to such beneficiary in person, or from dealing with any authorized agent or representative of any beneficiary within the scope of the authority of such agent or representative in all respects as they might deal with the beneficiary himself.

7. In all matters pertaining to the execution of the trust, the decision, determination or opinion of a majority of the Trustees shall be final and shall have the same effect as the unanimous decision, determination or opinion of all the Trustees, and any action which may be taken hereunder by the Trustees or a majority of them shall be final and binding upon all parties in interest hereunder and not subject to impeachment or review on any ground except for gross negligence or actual fraud. In all matters of a ministerial nature the Trustees or a majority of them may delegate to any one of

their number the power to act with the same effect as though such action had been taken by them unanimously, and any act done by any one of the Trustees if subsequently ratified or approved by a majority of them shall have the same force and effect as though such act had been done in the first instance by a majority or by all of the Trustees.

8. In case all of the property hereby conveyed in trust shall be disposed of by the Trustees in accordance with the power and authority herein granted before the expiration of the term of the trust hereinbefore specified, the trust hereby created shall in that event terminate subject only to the duty of the Trustees to account. The term of the trust hereinbefore specified may also be shortened in the manner following, to-wit:

169 Whenever persons owning or representing not less than fifty-one per cent (51%) of the entire beneficial interest hereunder shall file with the Trustees or deliver to them a request in writing that the trust be terminated, either forthwith, or at a time specified in such request within the period first herein mentioned, the trust shall terminate at the time specified in such request subject only to the duty of the Trustees to account and to make conveyance as hereinafter provided of any property which shall remain in their hands undisposed of and not then subject to distribution. Any property so remaining upon the expiration of the trust, whether terminated by request of the beneficiaries or by expiration of the term, shall upon such termination be conveyed by the Trustees by good and sufficient conveyance back to the Pfister Land Company, the party of the first part herein, and the Trustees shall thereupon be relieved and discharged of all liability hereunder whatsoever except to account for any proceeds which shall have come to their hands and for which they shall not therefor have accounted. Any such property so conveyed back to the party of the first part shall be subject to any claims or obligations or liabilities which may have been incurred by the Trustees in the administration of the trust hereunder and which shall not have been discharged before such reconveyance; provided, that in case the Trustees shall have faithfully performed their duties hereunder

170 they shall not be required to reconvey to the party of the first part any property which may remain in their hands before the expiration of the term of the trust first herein specified until all obligations or liabilities incurred by them as Trustees shall have been satisfied or a sufficient provision is made for the release of the Trustees from any such obliga-

tions or liabilities upon the assumption of the same by the party of the first part upon receiving such reconveyance. Conveyances executed by a majority of the Trustees shall have the same force and effect as though the same were executed by all of the Trustees.

8½. During the continuance of the trust the Trustees shall annually and as soon as practicable after the first day of April in each year mail to each of the beneficiaries at his or her last known post office address a statement showing the results of the administration of the trust for the preceding year, the assets and liabilities of the trust estate at the close thereof, the amounts received and disbursements during the year, and indicating the sources of the receipts and the purposes for which the disbursements were made.

9. On the death, resignation, removal or inability to act of any of the parties of the second part named herein as Trustees, or of any one who may hereafter become a Trustee hereunder during the term of the trust, steps to fill such vacancy shall be taken and the same shall be filled as follows:

171 It shall be the duty of the surviving Trustees or Trustee, except in the case of a removal of a Trustee by the stockholders, as above provided, to bring the fact of a vacancy in the Board of Trustees promptly to the attention of the party of the first part herein and its Board of Directors as then constituted shall have the authority to fill such vacancy, or they may do so without such notice from the Trustees if they have knowledge of the fact of such vacancy; provided, however, that if such directors shall fail to fill such vacancy within sixty (60) days after the fact thereof is brought to their knowledge, the surviving Trustees may appoint the third Trustee to fill such vacancy, or if it should happen that two of such Trustees should die leaving only one surviving, and the directors of the party of the first part should fail to fill the vacancies within sixty (60) days after notice thereof, the surviving Trustee may appoint two other Trustees to fill the vacancies; but whenever a vacancy in the office of Trustee shall be filled by the surviving Trustees or Trustee without the action of the Board of Directors of the party of the first part sanctioning or ratifying the same, notice thereof shall be given addressed to the last known post office address of each of the beneficiaries hereunder and at any time within sixty (60) days after such notices shall be been mailed, any beneficiary may object in writing to such appointment stating

fully the grounds of such objection, and thereupon such
172 appointment and the objection thereto shall be submitted to the Circuit Court of Milwaukee County as speedily as practicable or to one of the judges of said Court, and such appointment shall be subject to the approval or disapproval of the court or of such judge after giving the party or parties objecting and the Trustees or Trustee making such appointment an opportunity to be heard. In case no such objection is made the appointment so made without the action of the Board of Directors of the party of the first part shall become effective sixty (60) days after the same shall have been made and notice thereof given as aforesaid, and in case such objection shall be made, such appointment shall not become effective unless and until approved by the Circuit Court of Milwaukee County, or a judge thereof, as above provided, and if the objection or objections made shall be sustained, or for any reason the appointment made is disapproved by the court or such judge, the Circuit Court of Milwaukee County or a judge thereof upon application of the surviving Trustee or Trustees or of any beneficiary hereunder may fill the vacancy upon such notice to the parties in interest as may be directed by the court or such judge to whom the application is made.

10. Any person or corporation appointed hereunder as a Trustee in the manner provided herein to fill any vacancy which may occur in the office of Trustee hereunder, upon acceptance of the trust when such appointment is made by the Board of Directors of the party of the first part or
173 upon acceptance and the appointment becoming effective when otherwise made, as hereinbefore provided, shall have the same power and authority and be subject to the same duties and responsibilities as the parties of the second part named herein as Trustees.

In any case however the appointment of any trustee hereunder hereafter made shall be by an instrument in writing witnessed and acknowledged in the manner provided by law to entitle an instrument to be recorded in the office of the Register of Deeds and shall be duly recorded as an amendment to or modification of this conveyance.

No irregularity in the appointment of any Trustee hereunder or the failure to observe any formality or direction herein in the making hereof, nor involving actual fraud or bad faith shall in anywise affect the validity of such appointment unless objections thereto shall be made within sixty (60) days after notice of such appointment and within six

(6) months from the time when the instrument making such appointment shall have been recorded as above provided; and in all conveyances made or in any transactions with third persons, the validity of any such conveyance or the rights of third persons in such transactions shall not be affected by any such irregularity in the appointment of any trustee hereunder unless the grantee in such conveyance or the other party to such transaction shall have had actual notice of the irregularity and it shall have been of a substantial character materially affecting the rights of the beneficiaries hereunder.

11. In case the property retained by the party of the first part shall not yield sufficient revenue or the proceeds of sales thereof shall not be sufficient to pay the taxes upon its property and necessary running expenses, the Trustees hereunder are authorized and directed upon request of the party of the first part to advance to it as needed from time to time such sums of money as may be necessary to pay the taxes and charges upon the property and all necessary running expenses. All such advances shall be carried upon the books of the Trustees as an open account against said corporation, to be repaid as and when the proceeds of sales of property of the party of the first part or its circumstances may permit.

12. No bond shall be required of the Trustees hereunder or any of them in the first instance, but upon demand made in writing by any beneficiary hereunder the Trustees shall within thirty (30) days thereafter give a bond in such sum as may be demanded, not exceeding One Hundred Thousand Dollars ($100,000.00) in the aggregate, conditioned for the faithful performance of their duties hereunder as Trustees jointly and severally, with the party of the first part herein as obligee thereof with a surety company or surety companies authorized to transact business in the state of Wisconsin as surety or sureties. In case of the appointment of another Trustee hereunder to fill any vacancy a similar bond may be demanded for such new Trustee or the bond which may theretofore have been given if then in force may be amended or extended to cover the acts and conduct of such new Trustee. The expenses of obtaining such bond and the premiums required to keep the same in force shall be paid out of the proceeds in the hands of the Trustees as a part of the expenses of the trust. In case the Trustees or any Trustee required to give such bond shall fail to do so within thirty (30) days after such request, the office of such Trustee or Trustees so failing or refusing to give such bond shall there-

upon become vacant and another Trustee or other Trustees able and willing to give such bond shall be appointed in their place or places in the manner hereinbefore provided for filling vacancies, and upon the bond so requested being given by such succeeding Trustee or Trustees, the appointment so made to fill any such vacancy or vacancies shall become effective and complete; provided, that any bond which may be given hereunder shall be subject to the approval of the directors of the party of the first part, and no bond which shall be disapproved by them shall be a compliance with the requirements hereof.

In Witness Whereof the party of the first part has caused these presents to be duly executed by its president and secretary and its corporate seal to be affixed, and the parties of the second part in evidence of their acceptance of the trust have hereunto set their hands and seals the day and year first above written.

PFISTER LAND COMPANY,
By JOHN W. MARINER,
President.

Attest:
J. W. DADMUN
Secretary

In Presence of
J. N. KURTZ
A. M. STETTEN

JESSE HOYT SMITH (Seal)
CHARLES F. PFISTER (Seal)
JOHN W. MARINER (Seal)

Pfister Land Company
Seal on original document
OSCAR E. NELL
CHARLES BEHRENS, JR.

176 State of Wisconsin, } ss.
Milwaukee County. }

Personally came before me this 29th day of November, 1916, the above named John W. Mariner, president, and J. W. Dadmun, secretary of Pfister Land Company, to me known to be the persons who executed the foregoing instrument and acknowledged the same, and the said John W. Mariner and J. W. Dadmun being first duly sworn each for himself declared that said instrument so executed and acknowledged by them as such president and secretary of the Pfister Land

Company was so executed pursuant to a resolution duly adopted at a stockholders' meeting of said Pfister Land Company duly called and held at the office of the company on the 27th day of November, 1916, and that upwards of two-thirds of all of the outstanding stock of said company were duly represented at such meeting and voted in favor of such resolution and none to the contrary.

Acknowledged and subscribed and sworn to before me the day and year above written.

J. N. KURTZ,
Notary Public, Milwaukee County, Wisconsin.

Notarial seal of J. N. Kurtz affixed to original document. My commission expires July 6, 1919.

State of Wisconsin, } ss.
Milwaukee County. }

Personally came before me this 29th day of November, 1916, the above named Charles F. Pfister, Jesse Hoyt Smith and John W. Mariner, to me known to be the persons who executed the foregoing instrument and acknowledged the same.

J. N. KURTZ,
Notary Public, Milwaukee County, Wisconsin.

Notarial seal of J. N. Kurtz affixed to original document. My commission expires July 6, 1919.

128 * * (Captions Nos. 28070; 34678; 34758; 40426; 34759; 35815 and 41089.) * *

Promulgated October 7, 1931.

The beneficiaries of a trust who, as such, have no remainder interest in the trust corpus, are not entitled to depletion deductions because of the removal of iron ore from properties forming a part of the trust corpus.

Charles F. Fawsett, Esq., and Richard S. Doyle, Esq., for the petitioners.

P. A. Bayer, Esq., for the respondent.

These proceedings, which were consolidated for hearing, involve but one issue, namely, whether the beneficiaries of a trust are entitled to a pro rata deduction for depletion of the trust corpus. All other errors alleged in the several petitions were expressly waived and abandoned.

The calendar years involved and the deficiencies determined for each year are as follows:

A True Copy:

Teste

(Seal)

B. D. GAMBLE
Clerk U. S. Board of Tax Appeals.

	Docket	Year	Deficiency
129	28070	1922	$ 848.30
	34678	1923	2,065.93
	34758	1923	7,590.58
	34759	1923	6,281.54
	35815	1923	941.27
	40426	1924	1,049.53
		1925	1,701.43
		1926	2,806.45
	41089	1926	280.93

Upon suggestion of death of the petitioner in docket numbered 28070, a motion was granted substituting the executors of the last will and testament of Charles F. Pfister as the party petitioner in this proceeding, being the same party appearing as petitioner in docket numbered 34678.

The proceedings were submitted upon the admissions of the pleadings and an agreed statement of facts.

FINDINGS OF FACT.

On or about November 29, 1916, the Pfister Land Company, a Wisconsin corporation, pursuant to authority of its stockholders and directors, executed a trust conveyance whereby for a nominal consideration of one dollar and other valuable consideration it granted to Charles F. Pfister, Jesse Hoyt Smith and John W. Mariner, certain real property as therein described. The designated individuals were to hold the property in trust during the lives of said Smith and Mariner, and for twenty-one years thereafter, and, as trustees, they were given full power to sell, lease, mortgage or
otherwise dispose of the trust property, and had full
130 management and control thereof. After providing for
the payment of taxes and necessary expenses incident to administration, including compensation for the trustees, the trust deed provided:

Except as above authorized to be expended, paid out or retained, all proceeds which shall come to the hands of the

Trustees from said property or from any use which may be made thereof, or from any source whatsoever hereunder as received by the Trustees shall belong to and be the property of the beneficiaries hereunder to be distributed and paid over to them in proportion to and in accordance with their respective interests as shown herein, or as the same shall from time to time appear as hereinafter provided.

The beneficiaries named in the trust deed and their respective interests as created by said instrument were as follows:

Jesse Hoye Smith	One-Quarter
Lucinda W. Mariner	One-Eighth
John W. Mariner	One-Eighth
Charles F. Pfister	One-Eighth
Louise F. Vogel	One-Eighth
Executors of and Trustees under the Last Will and Testament of Jesse Hoye, deceased	One-Quarter

Upon the expiration of the trust by lapse of time or upon the happening of certain contingencies prior to such expiration, which said contingencies did not occur before or during the years in question and thus are not here material to the issue, the trustees were to convey any property remaining in the trust corpus back to the grantor corporation, Pfister Land Company.

At the time of the execution of said trust conveyance, to-wit, November 29, 1916, the Bristol Mine referred to therein was subject to a mining lease for a term of upwards of fourteen years. The royalty rates reserved in said lease was nineteen cents per ton.

The stipulated facts omitting the numbering of and changing the order of the paragraphs, read in part as follows:

131 If as a matter of law the petitioners are entitled to any deduction from taxable income received during the years in question under the provisions of this trust for depletion of the ore reserves in said mine, the basis of such determination is correctly stated as follows:

Ore reserve, March 1, 1913	3,556,732 tons
Mined March 1, 1913, to November 29, 1916	1,392,806 "
Ore reserve November 29, 1916	2,163,926 "
Royalty rate $0.19 per ton	
Gross expected royalty	411,145.94
Less 3% expected expense	12,334.37
Net expected profit	398,811.57
Rate 6% and 4% life 9 years, Factor	.719198
Present Worth as of November 29, 1916	286,824.48
Depletion unit per ton	.13255

In the following schedule is shown the tons mined from the said Bristol mine during the years in controversy, the royalties received by the trustees and the depletion sustained resulting from the application of the rate of $.13255 per ton applied to said production and income.

Depletion Schedule

Year	Tons Mined	Royalty Earned	Depletion Sustained
1922	115,996	$ 23,528.70	$15,375.27
1923	453,803	130,898.66	60,151.59
1924	110,489	26,031.39	14,645.32
1925	270,649	50,837.10	35,874.52
1926	378,878	68,890.53	50,220.28

The proportional interest of the petitioner beneficiaries in the trust income was as follows:

Beneficiary	Year				
	1922	1923	1924	1925	1926
Ida Lane Smith	1/4	1/4	1/4	1/4	1/4
John W. Mariner	1/4	1/4	1/4	1/4	1/4
Charles F. Pfister	1/8	1/8	1/8	1/8	1/8
Elmwood Company of Delaware	1/8	1/8	1/8	1/8	1/8

132 Since the execution of said trust conveyance it has been the practice of the trustees thereunder as authorized and required by the terms thereof to make distribution of the entire royalties received by them under said lease from time to time among the beneficiaries of said trust in accordance with their respective interests * * *, after paying or reserving costs of administration and prior charges, but without otherwise reserving from such distribution any portion of such royalties as a depletion reserve.

The petitioners waive all other issues or questions raised in their respective petitions in the above-entitled cases except the question of their right to deductions as claimed by them from taxable income on account of depletion.

Ida Lane Smith, the petitioner in Docket Nos. 34758 and 40426, is the successor in right, title and interest under the trust deed to Jesse Hoyt Smith, a beneficiary under the trust deed of a one-quarter interest.

Elmwood Company, the petitioner in Docket No. 41089 and Docket No. 35815, is the successor in right, title, and interest to Louise F. Vogel, a beneficiary under the trust deed of a one-eighth interest.

John W. Mariner, the petitioner in Docket No. 34759, in

addition to the interest which he originally had under the trust deed, has succeeded to the right, title and interest of Lucinda W. Mariner of one-eighth, and the distributions under the trust deed have been made accordingly since such succession, which was prior to the year 1922.

133 For the calendar years 1922 to 1926, inclusive, the fiduciary returns claimed depletion deductions based on a depletion rate of .13255 cents of each beneficiary by disallowing the depletion deductions and determined the deficiencies hereinbefore set forth.

OPINION.

McMAHON: The sole issue presented by these proceedings is whether the beneficiaries of a trust are entitled to deductions for depletion because of iron ore removed from properties forming a part of the trust corpus.

The principle is well established by decisions of this Board and the Circuit Courts that beneficiaries of a trust are not entitled to reduce their distributive share of trust income because of depletion or depreciation of the trust corpus. *Detroit Trust Company, et al., Executors,* 16 B. T. A. 207; *George Snyder Crilly et al.,* 15 B. T. A. 642; *Gilbert B. Goff,* 18 B. T. A. 283; *Rita M. Kohler White et al.,* 23 B. T. A. 391; *Baltzell* v. *Mitchell,* 3 Fed. (2d) 428; certiorari denied, 268 U. S. 690; *Whitcomb* v. *Blair,* 25 Fed. (2d) 528; affirming *Louis P. V. Whitcomb et al.,* 4 B. T. A. 80; *Abell* v. *Tait,* 30 Fed. (2d) 54; *Hubbell* v. *Burnet,* 46 Fed. (2d) 446; affirming *F. C. Hubbell et al.,* 14 B. T. A. 1040; *Roxburghe* 134 v. *United States,* 64 Ct. Cls. 223; sections 214 (a) (10) and 234 (a) (9) of the Revenue Act of 1921; sections 214 (a) (9) and 234 (a) (8) of the Revenue Acts of 1924 and 1926; and section 215 (b) of the Revenue Acts of 1921, 1924 and 1926.

The petitioners base their claims for depletion deductions upon the decision of the Circuit Court for the Second Circuit in *Kate Fowler Merle-Smith et al.* v. *Commissioner,* 42 Fed. (2d) 837, overruling our decisions in *Kate Fowler Merle-Smith,* 11 B. T. A. 254, and *Margaret B. Fowler,* 11 B. T. A. 265. This Circuit Court decision was considered by the Board in the *Rita M. Kohler White* case, *supra,* in determining that the petitioners therein, who were beneficiaries of a testamentary trust, were not entitled to depreciation deductions because there was no provision in the will authorizing the trustees to retain a portion of the income to replace

wasting assets. The distinction between this Circuit Court's case and this Board case is that in the former the beneficiaries had an interest in the trust corpus as remaindermen, whereas in the latter, the beneficiaries had an interest only in the income.

In the instant case, as in the *White* case, the beneficiaries had no remainder interest in the trust corpus, because under the terms of the trust deed the trustees, upon the termination of the trust, were to convey back to the grantor corporation any remaining assets in the corpus.

The petitioners also contend that the trustees were merely agents of the beneficiaries in administering the trust and
135 paying over the proceeds. This argument is rebutted by the trust instrument, which in clear and unambiguous terms creates the trust, names the trustees, specifies in detail their duties, powers, and authority, and provides for the distribution of the proceeds to the beneficiaries in accordance with their respective interests.

In view of the foregoing discussion and the authorities cited we approve the action of the respondent.

Reviewed by the Board.

Judgment will be entered for the respondent.

1931. 136 * * (Caption 28070) * *

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated October 7, 1931, it is

Ordered and Decided: That there is a deficiency of $848.30 for the year 1922.

(Signed) STEPHEN J. MCMAHON
(Seal) *Member.*

Enter: Oct-9 1931

137 * * (Caption 34678) * *

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated October 7, 1931, it is

Ordered and Decided: That there is a deficiency of $2,065.93 for the year 1923.

(Signed) STEPHEN J. MCMAHON
(Seal) *Member.*

Enter: Oct-9 1931

138 * * (Caption 34758) * * Entered Oct. 9, 31

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated October 7, 1931, it is

Ordered and Decided: That there is a deficiency of $7,590.58 for the year 1923.

(Signed) STEPHEN J. MCMAHON
Member.

(Seal)

Enter: Oct-9 1931

138½ * * (Caption 34759) * *

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated October 7, 1931, it is

Ordered and Decided: That there is a deficiency of $6,281.54 for the year 1923.

(Signed) STEPHEN J. MCMAHON
Member.

(Seal)

Enter: Oct-9 1931

139 * * (Caption 35815) * *

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated October 7, 1931, it is

Ordered and Decided: That there is a deficiency of $941.27 for the year 1923.

(Signed) STEPHEN J. MCMAHON
Member.

(Seal)

Enter: Oct-9 1931

140 * * (Caption 40426) * *

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated October 7, 1931, it is

Ordered and Decided: That there are deficiencies as follows:

Year	Amount
1924	$1,049.53
1925	$1,701.43
1926	$2,806.45

(Signed) STEPHEN J. McMAHON
Member.

(Seal)
Enter: Oct-9 1931

141 * * (Caption 41089) * *

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated October 7, 1931, it is

Ordered and Decided: That there is a deficiency of $280.93 for the year 1926.

(Signed) STEPHEN J. McMAHON
Member.

(Seal)
Enter: Oct-9 1931

24, 1932. 143 * * (Captions, Nos. 28070; 34678; 34758; 34759; 35815; 40426 and 41089.) * *

PETITION FOR REVIEW OF DECISION OF THE BOARD OF TAX APPEALS.

Filed February 24, 1932.

To the Circuit Court of Appeals for the Seventh Circuit:

Your petitioners respectfully show:

First: This is a proceeding for review by the United States Circuit Court of Appeals for the Seventh Circuit of the decisions of the United States Board of Tax Appeals entered on October 9, 1931, redetermining deficiencies in income and profits taxes against the petitioners in the proceedings before said Board in the above entitled cases as follows:

In the proceeding, Docket No. 28070, for the year 1922, in the amount of $848.30.

144 In the proceeding, Docket No. 34678, for the year 1923, in the amount of $2,065.93.

In the proceeding, Docket No. 34758, for the year 1923, in the amount of $7,590.58.

In the proceeding, Docket No. 34759, for the year 1923, in the amount of $6,281.54.

In the proceeding, Docket No. 35815, for the year 1923, in the amount of $941.27.

In the proceeding, Docket No. 40426, for the year 1924, $1,049.53; for the year 1925, $1,701.43; and for the year 1926, $2,806.45.

In the proceeding, Docket No. 41089, for the year 1926 in the amount of $280.93.

Said proceedings involved a single issue which was the same in each of said proceedings except as to the taxable year and the amount of the deficiency involved, and for the purposes of the hearing and determination of said proceedings the same were consolidated before the Board of Tax Appeals, and by stipulation, filed herewith, have been consolidated for the purposes of this review.

Second: The individual petitioners in said proceedings were and are all residents of the city of Milwaukee,
145 county of Milwaukee, state of Wisconsin, and the Elmwood Company, the petitioner in the proceedings, Docket Nos. 35815 and 41089, is, and at all the times referred to herein, was a corporation duly organized and existing under the laws of the state of Delaware with its principal office and place of business in the city and county of Milwaukee in said state of Wisconsin. The income and profits tax returns for the taxable year or years involved in the above entitled proceedings and upon which said deficiencies as determined by said Board were based were all duly filed with the collector of internal revenue at Milwaukee, Wisconsin.

Third: The nature of the controversy before the Board of Tax Appeals was the determination of income and profits taxes due from petitioners respectively for the years involved in said proceedings as stated above, under the Revenue Act of the United States applicable thereto, involving the determination of the question as to whether or not the petitioners as beneficiaries of a trust were entitled to deductions from income for the purposes of their income taxes respectively, be-
cause of the removal of iron ore from an iron mine which
146 formed a part of the corpus of the trust. Said iron mine was subject to a long term mining lease under which the trustees as the owner of the fee were entitled to receive as royalty 19 cents per ton for each ton of ore removed from said mine during the year, and under the terms of the trust the proceeds of such royalties on receipt thereof by the trustees became the property of the beneficiaries under the trust, and the trustees were required to pay over and distribute the

same as received to such beneficiaries in accordance with their respective interests, after payment of taxes and deducting expenses of administration.

In accordance with the terms and requirements of the trust deed, the entire royalties as and when received by the trustees less taxes and expenses of administration were paid over and distributed to the petitioners as beneficiaries under said trust in accordance with their respective interests.

The sole question involved in the proceedings before the Board of Tax Appeals and requiring the determination of the Board was the question whether as matter of law the petitioners were entitled to deductions for depletion under the provisions of the applicable revenue acts for the taxable years involved.

147 Fourth: The errors committed by the Board of Tax Appeals upon which the petitioner relies as the basis of this proceeding are as follows:

1. The Board of Tax Appeals decided that as matter of law the petitioners as the beneficiaries of said trust were not entitled to any allowance or deduction from the proceeds of the royalties received by them in the years involved in said proceedings as aforesaid in the computation of taxable income, and that the entire proceeds of the said royalties received by them as aforesaid should be included in their incomes respectively for the years involved and subjected to the tax without any deduction for depletion of said mine due to the removal therefrom of the ore from which said royalties were derived. In so ruling and deciding the Board of Tax Appeals erred.

2. Pursuant to such determination the Board of Tax Appeals decided and ordered that there were and are deficiencies in tax against the petitioners in said proceedings as follows:

Against the petitioners in Docket No. 28070 for the year 1922 in the sum of $848.30.

Against the petitioners in the proceedings, Docket No. 34678 for the year 1923, in the sum of $2,065.93.

148 Against the petitioner in the proceeding, Docket No. 34758, for the year 1923, in the amount of $7,590.58.

Against the petitioner in the proceeding, Docket No. 34759 for the year 1923, in the sum of $6,281.54.

Against the petitioner in the proceeding Docket No. 35815 for the year 1923 in the sum of $941.27.

Against the petitioner in the proceeding, Docket No. 40426

for the year 1924 in the sum of $1,049.53; for the year 1925 in the sum of $1,701.43; for the year 1926 in the sum of $2,806.45.

Against the petitioner in the proceeding, Docket No. 41089 for the year 1926, in the sum of $280.93.

In so deciding and ordering the Board of Tax Appeals erred with respect to each of said determinations and orders.

3. The Board of Tax Appeals erred in deciding and ordering that there was or is any deficiency in tax against the petitioners for any of the years involved in any of said proceedings, or in deciding that there was any deficiency in tax whatsoever against any of the petitioners.

4. The Board of Tax Appeals erred in not ordering judgment for the petitioners in each of said proceedings in
149 its report promulgated October 7, 1931 and upon which its said decisions ordering said deficiencies were based.

5. The Board of Tax Appeals erred in not ordering and deciding in each of said cases described by docket number as above that there was no deficiency in tax against the petitioner or petitioners in said case for the taxable year or years involved therein.

Wherefore petitioners and each of them pray that this Court may review the action of the Board of Tax Appeals in this cause, reverse the decisions and each of the decisions of said Board and direct the entry of a decision or decisions by said Board in favor of the petitioners and of each of them determining that there is no deficiency in income or profits taxes for the years 1922 to 1926 inclusive, or for any of said years, due from the petitioners or from any of them, or for such other and further relief as may to this Court appear proper in the premises.

CHARLES F. FAWSETT,
R. S. DOYLE,
Attorney for Petitioners.

P. O. Address:
753 N. Water Street,

Milwaukee, Wisconsin.
150 State of Wisconsin, } ss.
Milwaukee County.

CHARLES F. FAWSETT being duly sworn says: I am the attorney for the petitioners in this proceeding. I prepared the foregoing petition and am familiar with the contents thereof. The statement of facts contained therein are true to the best of my knowledge, information and belief. This petition is not filed for purposes of delay and I believe the petitioners are and that each of them is justly entitled to the relief sought.

CHARLES F. FAWSETT.

Subscribed and sworn to before me this 18 day of February, 1932.

C. F. MIKKELSON,
(Seal) *Notary Public, Milwaukee County, Wisconsin.*

178 * * (Captions, Nos. 28,070; 34678; 34758; 34759; 35815; 40426 and 41089.) * *
32.

PRAECIPE FOR TRANSCRIPT.

Filed February 24, 1932.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare a transcript of record in the above causes and on or before the 9th day of April, 1932, transmit the same to the Clerk of the Circuit Court of Appeals for the Seventh Circuit, and include in said transcript, copies, duly certified as correct, of the following documents:

1. The docket entries of proceedings before the Board in the above entitled proceedings;
2. Petitions for redetermination;
3. Respondent's answers.
4. Findings of fact and opinion of the Board, promulgated October 7, 1931.

179 5. Orders of redetermination entered October 9, 1931.

6. Petition for review by the United States Circuit Court of Appeals for the Seventh Circuit filed ....., 1932.

7. Stipulation of facts offered in evidence in said cases re-

ferred to in the report and opinion of the Board of Tax Appeals rendered therein including Exhibit A annexed thereto.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Seventh Circuit.

CHARLES F. FAWSETT,
P. O. Address: 735 N. Water St.
Milwaukee, Wisconsin.
R. S. DOYLE,
832 Shoreham Bldg.,
Washington, D. C.
Attorneys for Petitioners.

Service of a copy of the foregoing is accepted this 24th day of February, 1932.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

180 * * (Caption, Nos. 28070; 34678; 34758; 34759; 35815; 40426 and 41089.) * *

CERTIFICATE.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 180, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 29th day of March, A. D. 1932.

(Seal)

B. D. GAMBLE,
Clerk.

United States Circuit Court of Appeals for the Seventh Circuit

I, Frederick G. Campbell, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 109, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the twenty-second day of July 1932, on which the following-entitled cause was heard and determined: Charles F. Pfister (amended title, Otto H. Falk et al., Executors of the Estate of Charles F. Pfister, deceased) vs. Commissioner of Internal Revenue, No. 4766, October term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this 19th day of June, A.D. 1933.

[SEAL] FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States court room in the city of Chicago, in said Seventh Circuit, on the sixth day of October 1931, of the October term in the year of our Lord one thousand nine hundred and thirty-one, and of our independence the one hundred and fifty-sixth.

4766

CHARLES F. PFISTER (AMENDED TITLE OTTO H. FALK ET AL., EXECUTORS of the Estate of Charles F. Pfister, Deceased)

vs.

COMMISSIONER OF INTERNAL REVENUE

Petition for review of order of the United States Board of Tax Appeals

And on the fourth day of April 1932, there was filed in the office of the clerk of this court an appearance of counsel for petitioner, which said appearance is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit

No. 4766. October term, 1931

CHARLES F. PFISTER ET AL., PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

The clerk will enter my appearance as counsel for the petitioner.

CHARLES F. FAWSETT,
735 N. Water Street, Milwaukee, Wis.

Endorsed: Filed April 4, 1932. Frederick G. Campbell, clerk.

And afterwards, to wit, on the fifth day of April 1932, there was filed in the office of the clerk of this court an appearance of counsel for respondent, which said appearance is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit

No. 4766. October term, 1931

CHARLES F. PFISTER (AMENDED TITLE OTTO H. FALK ET AL., EXECUTORS of the Estate of Charles F. Pfister, deceased) et al., petitioners

vs.

COMMISSIONER OF INTERNAE REVENUE, RESPONDENT

The clerk will enter appearances as counsel for the respondent.

G. A. YOUNGQUIST,
Assistant Attorney General.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
DWIGHT H. GREEN,
Special Attorney, Bureau of Internal Revenue.

Endorsed: Filed April 5, 1932. Frederick G. Campbell, clerk.

And afterwards, to wit, on the thirteenth day of July 1932, there was filed in the office of the clerk of this court a stipulation to amend the title, which said stipulation is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit

No. 4766

CHARLES F. PFISTER (OTTO H. FALK, JOSEPH E. UIHLEIN, CHARLES P. Vogel, and Louis Quarles, Executors of the Estate of Charles F. Pfister, Deceased), petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Stipulation

It is hereby stipulated and agreed by and between the parties hereto that the title to the petition and the proceedings for review of the decision of the Board of Tax Appeals in the case of Charles F. Pfister v. Commissioner of Internal Revenue, docket no. 28070, be corrected to read, Otto H. Falk, Joseph E. Uihlein, Charles P. Vogel, and Louis Quarles, executors of the estate of Charles F. Pfister, deceased, petitioners, v. Commissioner of Internal Revenue, respondent, in accordance with the order of the Board of Tax Appeals dated October 3, 1931, copy of which is attached hereto and made a part hereof.

CHARLES F. FAWSETT,
Counsel for Petitioners.
C. M. CHAREST,
Counsel for Respondent.

Dated, July 9, 1932.

United States Board of Tax Appeals

Docket No. 28070

CHARLES F. PFISTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order

At the hearing of this proceeding on July 8, 1930, at Milwaukee, Wisconsin, counsel for the petitioner moved for a substitution of parties, stating that the petitioner, Charles F. Pfister, is now deceased, and counsel for the respondent agreed to this motion. It is therefore

Ordered, That Otto H. Falk, Joseph E. Uihlein, Charles P. Vogel, and Louis Quarles, executors of the estate of Charles F. Pfister, deceased, be, and hereby are, substituted as petitioners in this proceeding in the place and stead of Charles F. Pfister, deceased, and that the appeal shall proceed henceforth under the title of Otto H. Falk, Joseph E. Uihlein, Charles P. Vogel, and Louis Quarles, Ex-

ecutors of the Estate of Charles F. Pfister, Deceased, v. Commissioner of Internal Revenue.

(Signed) STEPHEN J. MCMAHON,
Member.

Dated, Washington, D.C., October 3, 1931.
Endorsed: Filed July 13, 1932. Frederick G. Campbell, clerk.

And on the same day, to wit, on the thirteenth day of July 1932, the following further proceedings were had and entered of record, to wit:

Wednesday, July 13, 1932

Court met pursuant to adjournment and was opened by proclamation.

Present: Hon. Samuel Alschuler, circuit judge; Hon. Evan A. Evans, circuit judge; Frederick G. Campbell, clerk; Henry C. W. Laubenheimer, marshal.

Before Hon. SAMUEL ALSCHULER, circuit judge

4766

CHARLES F. PFISTER, ETC.

vs.

COMMISSIONER OF INTERNAL REVENUE

Petition for review of order of the United States Board of Tax Appeals

Pursuant to stipulation of counsel, it is now here ordered that the title of this cause be corrected to read Otto H. Falk, James E. Uihlein, Charles P. Vogel, and Louis Quarles, Executors of the Estate of Charles F. Pfister, Deceased, petitioners, versus Commissioner of Internal Revenue, respondent, in accordance with the order of the Board of Tax Appeals dated October 3, 1931.

And afterwards, to wit, on the fourteenth day of September 1932, there was filed in the office of the clerk of this court an appearance of counsel for respondent, which said appearance is in the words and figures following, to wit:

No. 4766

United States Circuit Court of Appeals for the Seventh Circuit

October term, 1932.

CHARLES F. PFISTER, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

The clerk will enter my appearance as counsel for respondent.

SEWALL KEY,
Washington, D.C.

Endorsed: Filed September 14, 1932. Frederick G. Campbell, clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States court-room in the city of Chicago, in said Seventh Circuit on the fourth day of October 1932, of the October term in the year of our Lord one thousand nine hundred and thirty-two, and of our independence the one hundred and fifty-seventh.

And afterwards, to wit, on the sixteenth day of November 1932, there was filed in the office of the clerk of this court an appearance of counsel for the respondent, which said appearance is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit

No. 4766. October term, 1932

CHARLES F. PFISTER (AMENDED TITLE OTTO H. FALK ET AL., EXRS. OF the Estate of Charles F. Pfister, Deceased)

vs.

COMMISSIONER OF INTERNAL REVENUE

The clerk will enter our appearances as counsel for the respondent.

G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
Special Assistant to the Attorney Gen.
J. LOUIS MONARCH,
Special Asst. to the Attorney General.
C. M. CHAREST,
General Counsel, Bureau of Internal Rev.
PHILIP A. BOYER,
Special Atty., Bureau of Internal Rev.

Endorsed: Filed November 16, 1932. Frederick G. Campbell, clerk.

And afterwards, to wit, on the tenth day of January 1933, the following further proceedings were had and entered of record; to wit:

Tuesday, January 10, 1933

Court met pursuant to adjournment and was opened by proclamation.

Present: Hon. Samuel Alschuler, circuit judge, presiding; Hon. Evan A. Evans, circuit judge; Hon. William M. Sparks, circuit judge; Hon. Walter C. Lindley, district judge; Frederick G. Campbell, clerk; Henry C. W. Laubenheimer, marshal.

Before Hon. EVAN A. EVANS, Circuit Judge; Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. WALTER C. LINDLEY, District Judge

4766

OTTO H. FALK, EXECUTOR, ET AL.

vs.

COMMISSIONER OF INTERNAL REVENUE

Petition for review of order of the United States Board of Tax Appeals

It is ordered by the court that this cause be, and the same is hereby, set down for hearing on February 7, 1933.

And afterwards, to wit, on the seventh day of February 1933, the following further proceedings were had and entered of record, to wit:

Tuesday, February 7, 1933

Court met pursuant to adjournment and was opened by proclamation.

Present: Hon. Samuel Alschuler, circuit judge, presiding; Hon. Evan A. Evans, circuit judge; Hon. William M. Sparks, circuit judge; Hon. Walter C. Lindley, district judge; Frederick G. Campbell, clerk; Henry C. W. Laubenheimer, marshal.

Before Hon. SAMUEL ALSCHULER, Circuit Judge; Hon. EVAN A. EVANS, Circuit Judge; Hon. WALTER C. LINDLEY, District Judge

4766

OTTO H. FALK, EXECUTOR, ETC.

vs.

COMMISSIONER OF INTERNAL REVENUE

Petition for review of order of the United States Board of Tax Appeals

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and

on oral arguments by Mr. Charles F. Fawsett, counsel for petitioner, and by Mr. J. Louis Monarch, counsel for respondent, and the court having heard the same takes this matter under advisement.

And afterwards, to wit, on the sixth day of March 1933, there was filed in the office of the clerk of this court the opinion of the court, which said opinion is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit

No. 4766. October term, 1932. January session, 1933

CHARLES F. PFISTER (AMENDED TITLE, OTTO H. FALK ET AL., Executors of the Estate of Charles F. Pfister, Deceased), petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review of decisions of the United States Board of Tax Appeals

March 6, 1933

Before ALSCHULER and EVANS, Circuit Judges, and LINDLEY, District Judge

LINDLEY, District Judge:

This petition to review a decision of the United States Board of Tax Appeals involves seven applications of as many beneficiaries of a trust agreement for relief from assessments for deficiency in income taxes for each of the years 1922 to 1926, inclusive. These deficiencies arise out of the Board's refusal to allow the petitioners certain sums for depletion of the trust property. The amount of the sums deducted for such purpose and disallowed by the Board is not in controversy, and the sole question is whether petitioners were entitled to deduct the said items in making up their tax returns.

On November 29, 1916, the Pfister Land Company, a corporation, by authorized action, conveyed to trustees certain mineral property, with authority to sell, mortgage, or lease the same. After paying State and municipal taxes and the expenses of administration, the trustees were obligated to pay to petitioners as beneficiaries all income from the trust property. The land was then subject to a mining lease which continued until after the close of the period involved.

During the years in question the trustees collected the royalties provided in the lease and paid the same to the beneficiaries, without deduction of any sort except the taxes aforesaid and the comparatively small expenses of the trustees in administering their trust. In reporting the income thus received petitioners deducted the depletion items, which the Board refused to allow.

The pertinent revenue statutes of 1921, 1924, and 1926 provide that in computing net income there shall be allowed as a deduction in the case of mines "a reasonable allowance for depletion", which ordinarily is deducted by him who pays the tax. The evidence discloses that the mineral body was exhausted before the lease expired. Nothing of value remained for the trustees or the beneficiaries.

In Merle-Smith v. Commissioners, 42 Fed. (2nd) 837 (C.C.A. 2nd), certiorari denied, 282 U.S. 897, the court, having to do with a similar situation, said:

"The petitioners have a property right and interest, within the decision of Bryan v. Kennett, 113 U.S. 179, 5 S.Ct. 407, 28 L.Ed. 908, as real as that of the lessee referred to in Lynch v. Alworth-Stephens Co., supra. Their interest in the ore body is as direct as the interest of the lessor, which is contingent upon the fulfillment by the lessee of the obligations under its lease. Included in the current payment of royalties is a sum representing the value of each ton of ore removed. As stated in the Lynch case, allowance is to be made 'to everyone whose property right and interest therein has been depleted', and it would, therefore, seem that these petitioners should be allowed deductions for depletion, which their property interest sustained by reason of the mining operation.

"The Government accedes to the doctrine that in all mining operations there is some depletion. But whose ore is depleted is put into question. If the petitioners have any property interest in the corpus, it is being depleted. Certainly they who receive the income, the title owners of the corpus of the trust, the trustees, might have a depletion allowance. These petitioners who have the property right to which we have referred receive the royalties without deduction. The statutes provide for depletion. The trustees merely pass on the royalties received in the percentages the will requires of them. The terms of the trust require that the entire royalties be paid currently to the beneficiaries. No depletion reserve was to be set aside or retained by the trustees."

"A reasonable allowance for depletion should have been made to each of the petitioners in computing their income for the years in question."

We do not understand that the reason for the decision was that there was a remainder interest in the beneficiaries. Indeed, Judge Hand, in his concurring opinion, expressly disclaimed any intention to place the decision upon such ground.

Even though the existence of a right of remainder in the beneficiaries was material to the conclusion of the court in the case cited, it could hardly be said to be so here. In the instant case the only thing of value was the mineral; all this passed to the beneficiaries, and nothing of value remains in any one to which the depletion

could be said to be applicable. Their beneficial interest being the ore body, and their income having come entirely from the exhaustion of the same, it follows that they should be credited with the depletion or exhaustion of their capital assets. As said in Lynch v. Alworth-Stephens Co., 267 U.S. 364:

"Obviously, as the process goes on, this property interest of the lessee in the mines is lessened from year to year, as the owner's property interest in the same mines is likewise lessened. There is an exhaustion of property in the one case as in the other; and the extent of it, with the consequent deduction to be made, in each case is to be arrived at in the same way, namely, by determining the aggregate amount of the depletion of the mines in which the several interests inhere, based upon the market value of the product, and allocating that amount in proportion to the interest of each severally considered."

The depletion items represent the exhaustion of capital mineral assets—that is, the raw materials—all of which were exhausted within the period of the leasehold term and the proceeds, all of which passed to the beneficiaries. The trustees were permitted by law to pass on to their beneficiaries all royalties and retained nothing subject to tax. There was no title or interest in them against the exhaustion of which depletion would accrue. When Congress saw fit to place the beneficiaries in the category of owners to the extent that they might rightfully receive the proceeds of sale and taxed them thereon, it surely intended to pass on to them also the depletion of their capital assets as a reduction from the taxes assessed against the proceeds of sale thereof.

The decision of the Board of Tax Appeals is reversed with directions to allow the deductions claimed.

And on the same day, to wit, on the sixth day of March 1933, the following further proceedings were had and entered of record, to wit:

Monday, March 6, 1933

Court met pursuant to adjournment and was opened by proclamation.

Present: Hon. Samuel Alschuler, circuit judge, presiding; Hon. William M. Sparks, circuit judge; Hon. James H. Wilkerson, district judge; Frederick G. Campbell, clerk; Henry C. W. Laubenheimer, marshal.

Before Hon. SAMUEL ALSCHULER, Circuit Judge; Hon. EVAN A. EVANS, Circuit Judge; Hon. WALTER C. LINDLEY, District Judge

4766

OTTO H. FALK, JAMES E. UIHLEIN, CHARLES P. VOGEL, AND LOUIS QUARLES, Executors of the Estate of Charles F. Pfister, Deceased

vs.

COMMISSIONER OF INTERNAL REVENUE

Petition for review of order of the United States Board of Tax Appeals

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the decisions entered in this cause on October 9, 1931, by the United States Board of Tax Appeals, be, and the same is hereby, reversed, and that this cause be, and the same is hereby remanded to the said Board of Tax Appeals with directions to allow the deductions claimed.

And afterwards, to wit, on the twenty-fifth day of March 1933, there was filed in the office of the clerk of this court a petition for rehearing, which said petition for rehearing is not copied here.

And afterwards, to wit, on the thirty-first day of March 1933, there was filed in the office of the clerk of this court an answer to the petition for rehearing, which said answer to the petition for rehearing is not copied here.

And afterward, to wit, on the first day of May 1933, the following further proceedings were had and entered of record, to wit:

Monday, May 1, 1933

Court met pursuant to adjournment and was opened by proclamation.

Present: Hon. Samuel Alschuler, circuit judge, presiding; Hon. Evan A. Evans, circuit judge; Hon. William M. Sparks, circuit judge; Frederick G. Campbell, clerk; Henry C. W. Laubenheimer, marshal.

Before Hon. SAMUEL ALSCHULER, Circuit Judge; Hon. EVAN A. EVANS, Circuit Judge; Hon. WALTER C. LINDLEY, District Judge

4766

OTTO H. FALK ET AL., EXECUTORS, ETC.

vs.

COMMISSIONER OF INTERNAL REVENUE

Petition for review of order of the United States Board of Tax Appeals

It is ordered by the court that the petition for a rehearing in this cause be, and the same is hereby, denied.

United States Circuit Court of Appeals for the Seventh Circuit

I, Frederick G. Campbell, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 14, inclusive, contain a true copy of the proceedings had and papers filed (except briefs of counsel, stipulation and order relating to the filing of briefs, petition for a rehearing and the answer thereto) in the case of Charles F. Pfister (Amended Title Otto H. Falk et al., Executors of the Estate of Charles F. Pfister, Deceased) vs. Commissioner of Internal Revenue, No. 4766, October term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this 19th day of June, A.D. 1933.

[SEAL] FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is assigned for argument immediately following nos. 145 to 150, inclusive.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1933